No. 523

No. 12999

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In the

United States Court of Appeals for the Sixth Circuit

RAYMOND A. BIGGS,

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee.

Appeal from the District Court of the United States for the Eastern District of Michigan, Southern Division

FILED
OCT 24 1956
CARL W. REUSS, Clerk

JOINT APPENDIX

F. W. KAESS,
U. S. Attorney

G. E. WOODS,
Chief Assist. U. S. Atty.

8th Floor Federal Bldg.
Detroit 26, Michigan

Attorneys for
Respondent-Appellee

PAUL WALTER

WALTER & HAVERFIELD

1215 Terminal Tower
Cleveland 13, Ohio

Attorneys for
Petitioner-Appellant

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APPENDIX

RELEVANT DOCKET ENTRIES

1953

Mar. 3 Petition to Suppress Evidence filed.

Mar. 10 Order dismissing petition to suppress evidence for want of equity filed and entered. Koscinski, J.

Mar. 20 Notice of Appeal filed.

1954

Mar. 15 Mandate filed and entered.

Oct. 11 Ptf's. proposed Findings of Fact submitted before hearing at the request of the court filed.

Oct. 11 Hearing begins on motion to suppress evidence, adj. to Oct. 12/55. Koscinski, J.

Oct. 12 Hearing on motion to suppress evidence continued and taken under advisement with leave to file briefs. Koscinski, J.

1956

June 15 Order denying petition to suppress evidence filed and entered. Koscinski, J.

Aug. 13 Notice of Appeal filed.

INDICTMENT

The Grand Jury charges:

That on or about the 15th day of March, 1947, in the Eastern District of Michigan, Southern Division, RAYMOND A. BIGGS did wilfully and knowingly attempt to defeat and evade a large part of the income tax due and owing by him to the United States of America for the calendar year of 1946 by filing and causing to be filed with the Collector of Internal Revenue for the Internal Revenue Collection District of Michigan, at Detroit, Michigan, a false and fraudulent income tax return wherein he stated that his net income for the said calendar year was the sum of $23,722.64, and that the amount of tax due and owing thereon was $7,547.45, whereas, as he then and there well knew, his net income for the said calendar year was the sum of $96,155.65, upon which said net income he owed to the United States of America an income tax of $58,710.40, in violation of Section 145(b), Internal Revenue Code; Title 26, U.S.C., Section 145(b).

COUNT TWO:

The Grand Jury further charges:

That on or about the 15th day of January, 1948, in the Eastern District of Michigan, Southern Division, RAYMOND A. BIGGS, did wilfully and knowingly attempt to defeat and evade a large part of the income tax due and owing by him to the United States for the calendar year 1947 by filing and causing to be filed with the Collector of Internal Revenue for the Interral Revenue Collection District of Michigan, at Detroit, Michigan, a false and fraudulent income tax return wherein he stated that his net income for said calendar year, computed on the community property basis,

was the sum of $19,370.87, and that the amount of tax due and owing thereon was the sum of $5,591.71, whereas, as he then and there well knew, his net income for the said calendar year, computed on the community property basis, was the sum of $60,805.83, upon which said net income he owed to the United States of America an income tax of $31,753.15, in violation of Section 145(b), Internal Revenue Code; Title 26, U.S.C., Section 145(b).

COUNT THREE:

The Grand Jury further charges:

That on or about the 15th day of January, 1948, in the Eastern District of Michigan, Southern Division, RAYMOND A. BIGGS, who, during the calendar year 1947 was married to Joan Biggs, did wilfully and knowingly attempt to defeat and evade a large part of the income tax due and owing by the said Joan Biggs to the United States of America, for the calendar year 1947, by filing and causing to be filed with the Collector of Internal Revenue for the Internal Revenue Collection District of Michigan, at Detroit, Michigan, a false and fraudulent income tax return for and on behalf of the said Joan Biggs, in which it was stated that her net income for said calendar year, computed on the community property basis, was the sum of $5,682.22, and that the amount of tax due and owing thereon was the sum of $1,089.98, whereas, as he, RAYMOND A. BIGGS, well knew, her, Joan Biggs', net income for the said calendar year, computed on the community property basis, was the sum of $19,493.88, upon which said net income there was owing to the United States of America an income tax of $6,390.42, in violation of Section 145(b), Internal Revenue Code;

Indictment

Title 26, U.S.C., Section 145(b).

A True Bill.

Foreman

JOSEPH C. MURPHY
Chief Assistant United States Attorney

PETITION TO SUPPRESS EVIDENCE

(Filed March 3, 1953)

The Petitioner, Raymond A. Biggs, respectfully represents that:

(1) Your Petitioner now resides in, and has been at all times hereinafter related, a resident of Detroit, Michigan, and has at all times related herein filed his income tax returns at the office of the Collector of Internal Revenue in Detroit, Michigan.

(2) The office of the United States Attorney for the Eastern District of Michigan has given notice of intention to present evidence to the Grand Jury to obtain an indictment of your Petitioner for violation of the internal revenue laws in the filing of income tax returns by your Petitioner for the years 1946 and 1947.

(3) The evidence which the United States Attorney intends to present to the Grand Jury consists of information obtained from the Petitioner in violation of his rights guaranteed under the Fifth Amendment to the Constitution of the United States, under the circumstances hereinafter related.

(4) About the middle of February 1949 the Revenue Agent and the Special Agent of the Intelligence Unit of the Bureau of Internal Revenue who were investigating the income tax affairs of the Petitioner, requested permission to examine Petitioner's records showing the amount of fees received by him during the taxable years under investigation, including the years 1946 and 1947.

(5) Petitioner, upon learning of such request, consulted his then attorney, Norman Snider, and informed Mr. Snider that he would not

under any circumstances turn over certain books that he had showing records of professional receipts for the years 1946 and 1947 unless he had absolute assurance that he would not be prosecuted for violation of any laws of the United States.

(6) On the day following Petitioner's consultation with his attorney, the said attorney, Norman Snider, called upon Giles Kavanagh, the then Collector of Internal Revenue at Detroit, Michigan, and revealed to him the existence of Petitioner's books relating to the years 1946 and 1947. Petitioner's attorney informed Mr. Kavanagh that Petitioner would not surrender said books unless he was given absolute assurance that there would be no prosecution for any violation of the internal revenue laws. Mr. Kavanagh stated to Petitioner's attorney that he wished to look into the matter further before advising the attorney. Later, on the same day, Mr. Kavanagh called Petitioner's attorney and advised him that the Government did not consider Petitioner's case an appropriate one for prosecution and that Petitioner would be safe in turning over his books in order to facilitate the determination and payment of Petitioner's tax liability.

(7) Petitioner, upon being apprised by his attorney of the assurance given by the Collector of Internal Revenue, delivered to the Internal Revenue Agent and Special Agent investigating the case, said two books relating to the years 1946 and 1947. Such surrender and delivery was made on the day following that on which Petitioner's attorney had received the assurances aforesaid from the Collector of Internal Revenue. The two books thus surrendered were approximately 6-1/2 x 10 inches

in dimension, with a blue imitation leather covering, one book containing the printed legend "Lawyers Handy Book 1946" and the other "Lawyers Handy Book 1947" on the outside cover. The inside pages of both books showed names of patients and amounts collected day by day.

(8) After obtaining Petitioner's books as aforesaid, the investigating agents used the information contained therein, and other information obtained from the information in said books, as a basis for a recommendation of prosecution of Petitioner, and said information has been turned over to the United States Attorney, who intends to present it to the Grand Jury as the basis for an indictment to be returned against Petitioner as aforesaid.

(9) Attached hereto marked Exhibit A is a copy of an affidavit executed by Petitioner's former attorney, Norman Snider, concerning the delivery of Petitioner's books. Also attached hereto and marked Exhibit B is a copy of a statement concerning such delivery signed by Giles Kavanagh, former Collector of Internal Revenue, who has since deceased.

WHEREFORE: Your Petitioner prays that an order be entered:

(1) Restraining the United States Attorney and his assistants and agents from using as evidence before the Grand Jury, or in any criminal prosecution of the Petitioner, the aforesaid books of Petitioner, any information obtained from Petitioner's said books, and from using as evidence any information obtained, directly or indirectly, from or as a result of information shown in Petitioner's said books; and

(2) Directing the suppression of the aforesaid books, any information obtained from said books, and any information obtained, directly or indirectly, from or as a result of information shown in said books, as evidence in any criminal prosecution of the Petitioner.

s/ Ray Cashen

Ray Cashen
2117 Dime Building
Detroit 26, Michigan
ATTORNEY FOR PETITIONER

AFFIDAVIT OF NORMAN SNIDER

NORMAN SNIDER, being first duly sworn, deposes and says that the following statement is true and correct in all respects:

That deponent was formerly attorney for Dr. Raymond A. Biggs in connection with an income tax investigation covering the years 1944-1947 inclusive. About the middle of February, 1949, during deponent's employment as such attorney, deponent asked Dr. Biggs whether he could furnish the examining agents with any books or records which would enable the agents to compute the amount of tax du and get the case settled. Dr. Biggs called deponent a few days later and told him that he did have such record books for two of the four years. Dr. Biggs stated to deponent, however, that he would not under any circumstances turn over these books to the agents unless he had absolute assurance that he would not be prosecuted. Deponent stated that he would like to think this matter over and would call Dr. Biggs the next day. Deponent did call Dr. Biggs the following morning and stated that he, deponent, wished to take the matter up with Giles Kavanagh, the Collector. Deponent went to see Mr. Kavanagh the same morning, told him about the existence of the books and repeated Dr. Biggs' insistence that he be given absolute assurance on the matter of prosecution before surrendering the books. Mr. Kavanagh stated to deponent that he wished to look into the matter further before advising deponent. Later the same day Mr. Kavanagh called deponent and advised him that the case was not considered appropriate for prosecution and that Dr. Biggs would be safe in turning over the books in order to facilitate the determination and payment of the tax liability.

(Pet. Ex. #2)

Petition to Suppress Evidence

(Ex. "A")

Affidavit of Norman Snider

Deponent thereupon called Dr. Biggs and repeated to him the substance of what Mr. Kavanagh had said, saying in effect that he had been assured there would be no prosecution and that Dr. Biggs could safely surrender the books.

Although it is possible that Deponent may have misunderstood Mr. Kavanagh, Deponent gained the impression that Mr. Kavanagh had ascertained from the agents that the case was not regarded as a prosecution case at that time and that he, Mr. Kavanagh, therefore felt that the important thing was to collect any taxes due. In any event, Deponent definitely understood that Dr. Biggs was being given the assurance against prosecution, before he would surrender the books. During the same conversation, Mr. Kavanagh added that since this was a civil tax case, Deponent would be obliged to turn over the books or withdraw from the case.

The day after Deponent had repeated to Dr. Biggs the assurance given him by Mr. Kavanagh, Dr. Biggs brought the two books to Deponent's office and they were turned over to the examining agent.

And further deponent sayeth not.

s/ Norman Snider

Subscribed and sworn to before me, a Notary Public, this 5th day of June, A. D., 1952.

s/ Louis L. Weinstein
Notary Public, Wayne County, Michigan

My commission expires 3-8-54

(Ex. "B)

Mr. Kavanagh confirms the fact that Mr. Snider told him about the existence of the two books and asked him whether Dr. Biggs would be safe from prosecution if the books were turned over to the agents to facilitate the determination of the civil tax liability. Mr. Kavanagh was under the impression that this was a civil, not a criminal, tax case and so advised Mr. Snider. He further advised Mr. Snider that under the circumstances, he (Snider) had no alternative but to surrender the books or withdraw from the case.

Mr. Kavanagh understood that he had no authority to "promise immunity" in a criminal case. On the other hand, since the Biggs case, as he thought, was merely a civil case, Mr. Kavanagh felt it his duty as Collector to advise Mr. Snider of this fact and to insist that the books be surrendered in the interest of getting the tax determined and paid.

This statement is correct.

s/ Giles Kavanagh

ORDER DISMISSING PETITION TO SUPPRESS EVIDENCE FOR WANT OF EQUITY

At a session of said Court held in the Federal Building, in the City of Detroit, Michigan, on this 10th day of March, 1953.

PRESENT: HONORABLE ARTHUR A. KOSCINSKI
United States District Judge

A Petition was filed by RAYMOND A. BIGGS alleging that during an investigation of his income tax affairs by a revenue agent and a special Agent of the Intelligence Unit of the Internal Revenue Department, permission was requested of him to examine his records of fees received; that he consulted his attorney, advising the attorney that he had two books containing records of fees which he would not, under any circumstances, turn over to the revenue agents unless he had absolute assurance that he would not be prosecuted for violation of any laws of the United States; that his attorney conferred with the Collector of Internal Revenue for this district and was assured by the Collector that the Government did not consider petitioner's case an appropriate one for prosecution and petitioner would be safe in turning over his books to the agents to facilitate determination and payment of his tax liability; that his attorney advised him of this conversation and said, in effect, that he had been assured there would be no prosecution and petitioner could safely surrender the books, and that he thereupon delivered them to his attorney who turned them over to the revenue agents; that, after receiving the books, the investigating agents used the information contained in the books, and other information obtained from data therein, as a basis for recommending prosecution of this petitioner and said information has been turned over to the United States Attorney who intends to present it to the Grand Jury as basis for an indict-

ment to be returned against petitioner.

Petitioner prays for an order restraining the United States Attorney and his agents from using as evidence before the Grand Jury, or in any criminal prosecution of the petitioner, and directing the suppression as evidence in any criminal prosecution of the petitioner, the aforesaid books of petitioner, any information obtained therefrom, and any information either directly or indirectly obtained from or as a result of information shown in said books.

The Government filed a motion to dismiss the petition on the grounds 1) that the petition is lacking in equity, and 2) that this issue is prematurely raised. This motion was heard in open court and arguments presented by counsel for petitioner and the Government, and is now before this court for determination.

Petitioner contends that the facts pleaded in his petition show a clear violation of his basic constitutional rights, under the Fifth Amendment of the United States Constitution, which provides that no person shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law, since he was induced to surrender his books on an express assurance that he would not be prosecuted.

On the question as to whether or not the evidence obtained, under the facts as related in the petition, may be suppressed in advance of an indictment, defendant admits that authorities are not clear, but maintains that it may be suppressed, in a proceeding of this kind, relying principally on the decisions in the cases of In re: FRIED, 161 F. 2d,

453 (1947, CCA 2), which sanctioned the pre-indictment suppression of a confession obtained in violation of the Fifth Amendment, and In re: LIEBSTER, 91 F. Supp. 814 (1950, D.C., E.D. Pa.) in which evidence and a sworn statement obtained by Internal Revenue Agents was suppressed as having been obtained in violation of petitioner's rights under the same Amendment.

It is the Government's position that granting of the relief requested is limited to cases involving violation of the Fourth Amendment only, as held in CENTRACCHIO v. GARRITY, 198 F. 2d 382 (1952, CCA 5).

In the CENTRACCHIO v. GARRITY case, supra, the court explains the theory on which the District Court's jurisdiction is based in cases charging violations of rights under the Fourth Amendment, as depending upon considerations of an equitable nature, and states that authority in search and seizure cases have been recognized in Rule 41(e) of the Federal Rules of Criminal Procedure which authorize motions for return of property and suppression of evidence illegally seized without warrant. In such cases, by hypothesis, a violation of constitutional rights has already occurred by such seizure. But there, as in the instant case, the evidence was turned over voluntarily, for the purpose of determining income tax liabilities. The court in that case finds there is no authority sanctioning judicial interference of this sort with the action of a United States Attorney in the administration of a criminal law, at a pre-indictment state in other than search and seizure cases with the exception of the FRIED case, supra. It does not express any view on the correctness

of that decision except to note that Rule 41(e) does not sanction the relief there granted and that the facts in that case, which concern a forced confession, do not apply to the facts in the CENTRACCHIO case.

If the decision in the FRIED case, supra, extended the remedy which courts now clearly acknowledge is available for violation of rights under the Fourth Amendment, that is, cases involving illegal search and seizure, and the issued in that case were correctly decided, the effect of that decision would, at most, apply to violations of the Fifth Amendment only insofar as forced confessions are involved.

The petition in the present case, as the one in the CENTRACCHIO case, does not disclose that petitioner had yet suffered any violation of his constitutional rights, under the Fifth Amendment.

This court fully agrees with the court's decision in the CENTRACCHIO Case, and reasoning therefor, particularly its view that questions as to admissibility of evidence which may be produced by the Government at some future criminal trial ought not to be determined by the District Court, or on appeal, on a pre-indictment petition for the suppression of evidence such as this case involves.

Dismissal of this petition for want of equity will not prejudice petitioner's rights to raise the question of admissibility of evidence disclosed by him, in the event of indictment.

IT IS THEREFORE ORDERED that the petition to suppress evidence filed herein be and the same is hereby dismissed for want of equity.

s/ Arthur A. Koscinski
Arthur A. Koscinski
United States District Judge

ORDER ON MOTION TO DISMISS APPEAL

(Filed Feb. 19, 1954)

Before SIMONS, Chief Judge; ALLEN and MARTIN, Circuit Judges.

Upon consideration of a motion by the above appellee to dismiss an appeal from an order of the district court overruling a motion to suppress evidence, and upon full hearing on oral argument and the presentation of briefs,

IT IS HEREBY ORDERED that the motion to dismiss be and it is hereby denied, in reliance upon In Re Fried, 161 F. 2d 453 (2 Cir.), wherein it was held that a confession obtained in violation of the privilege against self incrimination may be suppressed in advance of indictment. While the government applied for certiorari and the writ was granted, 331 U. S. 804, it was subsequently dismissed on motion of counsel for the government, 322 U. S. 807.

Since upon the hearing it was made clear that the meritorious issue as to the violation of the privilege against self incrimination was not reached in the district court, we see no occasion for further argument upon a final hearing upon the appeal, and the cause is remanded to the district court with instructions to pass upon the merits of the motion to suppress the evidence.

It is so ordered.

APPROVED FOR ENTRY,

/s/ Charles C. Simons
Chief Judge

TRANSCRIPT OF PROCEEDINGS

* * *

Transcript of proceedings had upon Motion to Suppress Evidence in the above-entitled matter before the Honorable Arthur A. Koscinski, District Judge, at Detroit, Michigan, on October 11th and 12th, 1955.

COUNSEL PRESENT:

PAUL W. WALTER, Esq. (of Cleveland, Ohio) and
FRANK E. STEEL, Esq. (of Akron, Ohio),

Appearing on behalf of the Petitioner,
Raymond A. Biggs;

FREDERICK W. KAESS, Esq., United States Attorney, and
GEORGE E. WOODS, Esq., Chief Assistant United States Attorney,

Appearing on behalf of the Government.

---

[4]*

Detroit, Michigan,
Monday, October 11, 1955
10 o'clock A. M.

\- - -

THE COURT: In the matter of Raymond A. Biggs, Petition to Suppress Evidence.

Both sides ready to go ahead?

MR. WALTER: Yes, your Honor.

MR. WOODS: The Government is ready, your Honor.

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* Figures in brackets are the page numbers of the typewritten transcript of proceedings.

THE COURT: All right, you may proceed.

MR. WOODS: Your Honor, if I may have the indulgence of the Court, I would like to move for the admission, for the purpose of the trial of this cause, Mr. Paul W. Walter from Cleveland and Mr. Frank E. Steel from Akron, Ohio. Both gentlemen are admitted to practice before the Ohio Supreme Court and the United States Supreme Court and are otherwise duly qualified to appear before your Honor in the trial of this cause.

THE COURT: You may be admitted for the purpose of this hearing.

MR. WOODS: Thank you, your Honor.

MR. STEEL: Thank you, your Honor.

MR. WALTER: Thank you, your Honor.

THE COURT: The Petitioner may proceed.

[5] MR. WALTER: Your Honor, this matter originated in December of 1948, at which time a Byron Krieger of the Internal Revenue Department contacted the Petitioner, Dr. Biggs, to advise him that he would like to check his income tax returns for the years 1944, 1945, 1946 and 1947.

In response to Agent Krieger's request, certain documents and records were turned over to the Agent either at that time or shortly thereafter.

In due time, as investigation continued, Dr. Biggs availed himself of the services of counsel and retained Mr. Norman Snider to represent him in this matter. A series of conferences then followed between Mr. Snider and Agent Krieger, and sometime during January, 1949,

Special Agent Sullivan entered the case.

As the case proceeded, there was a request on behalf of the agents for additional records, if such records were available.

Attorney Snider from time to time talked to the Petitioner as to whether there were additional records, since it was necessary to obtain all possible information to facilitate the determination of the tax, if any, that might be due.

In the early part of February, Attorney Snider became aware from the Petitioner that there were two books, called "Lawyers Handy Books", in which he had records for the years 1946 and 1947. The [6] Petitioner advised Mr. Snider that if he was sure they would be used only for determination of the civil liability, he would turn them over, but in no event did he want them used if criminal prosecution was contemplated.

At about the middle of February, Attorney Snider asked permission of Petitioner to contact Mr. Giles Kavanagh, the then Collector of Internal Revenue, to find out from him the purpose of the investigation and whether or not criminal prosecution was contemplated.

With the consent of the petitioner, this contact was made between Attorney Snider and Internal Revenue Collector Giles Kavanagh.

At the first contact the Collector stated to the attorney that he would like to check into the matter as to whether or not criminal prosecution was in contemplation, and later that same day he phoned attorney Snider to advise him that there was no criminal prosecution contemplated, and that if the books were submitted it would facilitate the determination of civil liability, if any, and also advised attorney Snider that since he has

now revealed the books and has been advised that only civil process was to follow, he had no alternative except to submit the records or withdraw from the case.

This information was transmitted to the Petitioner, Dr. Biggs, and after consultation with his attorney, and being advised that the books were being submitted only for the determination of civil determina-
[7] tion of taxes, arrangements were made to turn these books over to Agents Sullivan and Krieger on February 24, 1949. The records were turned over on that day.

THE COURT: Just a moment, what was that date?

MR. WALTER: That is February 24, 1949.

THE COURT: What were the records that were turned over to the Government on that day?

MR. WALTER: The records that were turned over to the Government on that day were two Lawyers Handy Books, one for 1946 and one for 1947.

THE COURT: All right, I understand.

MR. WALTER: After those records were turned over, they were used then to facilitate the determination of tax.

And on March 8, 1950, a so-called 90-day letter was issued to the Petitioner and in due time the Petitioner filed a petition in Tax Court challenging the civil determination.

The next thing that then occurred was that notification was given to the Petitioner's then attorney that criminal prosecution was contemplated. This was in the spring of 1953.

And shortly before March 3, 1953, a Petition to Suppress was filed, which was heard before this Court, and at that time the matter did not go forward on its merits, and that same afternoon indictment followed for the years 1946 and 1947, and we are here today, your Honor, to proceed on the merits, as to whether or not the constitutional rights of [8] the Petitioner were violated in the inducement to submit the records for civil investigation, which were submitted only for that purpose; having been so submitted, were used for criminal prosecution, in violation and derogation of the Petitioner's rights.

THE COURT: You may call your witness.

MR. WALTER: Mr. Cashen.

RAY CASHEN was thereupon called as a witness on behalf of the Petitioner and, having been first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. WALTER:

MR. WALTER: May we, your Honor, stipulate as to the validity of the signature at this time before we proceed with the questioning of the witness?

THE COURT: Validity of what signature?

MR. WALTER: The validity of the signature of Giles Kavanagh.

THE COURT: Who is this witness?

MR. WALTER: Mr. Ray Cashen, who was attorney for the Petitioner at the time this signature of Giles Kavanagh was obtained.

MR. WOODS: I think, your Honor, counsel should proceed first with the witness, and if he has the document about which he is going to interrogate the witness, it should come at that time as to what it is and [9] by whom it is signed, the pertinency of it, and the like.

THE COURT: I take it that this witness is being placed on the witness stand to testify as to certain documents, and that he is merely a preliminary witness, and the Petitioner, Dr. Biggs, is going to follow him, or another witness.

MR. WALTER: We'll have other witnesses follow him. That's right, your Honor.

THE COURT: Are you going to put Dr: Biggs on the stand?

MR. WALTER: We have not decided at this point to put him on the stand, but we have these two documents we would like to place before the Court, and the testimony between the two parties that were involved in the transaction with Giles Kavanagh, which was to be our case in chief, and we would determine to use Dr. Biggs in rebuttal, if necessary.

THE COURT: You mean there is a possibility you may not place Dr. Biggs on the witness stand?

MR. WALTER: We have not come to that conclusion yet, your Honor. We thought we would put in our case in chief --

THE COURT: He is the most vital witness in this whole hearing, isn't he?

MR. WALTER: I believe that is so, and the facts --

THE COURT: And you are saying now you may be depriving the Court of the benefit of his testimony?

MR. WALTER: We have Dr. Biggs here and intend to use [10] Dr. Biggs if it is necessary to substantiate the evidence.

We were going to present to you the two documents to start the foundation of our case, and at that point, if Dr. Biggs' testimony is necessary, we will be very happy to present it to the Court. We have him here available for that testimony.

We have before us, your Honor, a statement signed by Giles Kavanagh, in which he confirms --

THE COURT: I have looked at that statement a dozen times and am quite familiar with it.

What I am interested in is to see what Dr. Biggs has to say himself.

MR. WALTER: Would you prefer to have us get these documents before you first, or would you prefer to have --

THE COURT: Now, I don't ordinarily tell counsel how to try their cases, and that is why I said that I take it that the witness called now is merely preliminary to the key witness in the case, and that is Dr. Biggs.

MR. WALTER: We are using Mr. Cashen as a preliminary witness at this time.

THE COURT: All right.

Q (By Mr. Walter) Mr. Cashen, will you please state your name and address for the record?

A Ray Cashen, 2117 Dime Building, Detroit.

Q And you are admitted to the practice of law in the State of

Michigan and before this Court?

[11] A I am.

Q Did you have occasion to represent Dr. Raymond Biggs, the Petitioner in this cause?

A I did.

Q At about what time, Mr. Cashen?

A Sometime in the spring, I believe, of '49.

Q In about the spring of 1952 did you have occasion to discuss with the then Collector of Internal Revenue, Giles Kavanagh, an arrangement he had made relative to the submission of certain records in the Raymond Biggs tax investigation?

A I talked to him in '52 and I talked to him prior to that time.

Q Was there a discussion about an arrangement he had made about the submission of certain records of Dr. Biggs?

A Yes, I talked to him about that and I talked to him prior to '52.

Q What did he say to you relative to that arrangement?

A He told me he had advised Dr. Biggs to turn the books over or advised Norm Snider that Dr. Biggs' case was a civil case, and that he should turn the books over.

Q Did you, in the course of that negotiation with Giles Kavanagh, obtain from him a written statement?

A Yes, I did.

(The above-mentioned statement signed by Giles Kavanagh was marked Petitioner's Exhibit No. 1 by the reporter.)

[12] Q (By Mr. Walter) I hand you what has been marked for

identification Petitioner's Exhibit 1. Will you identify that for the record? (Handing exhibit to the witness.)

A Yes, that is the precise statement.

THE COURT: That is what?

A That is the statement that Mr. Kavanagh gave me.

MR. WALTER: May we have leave, your Honor, to substitute a photostat copy of the original at this time?

MR. WOODS: The Government has no objection, your Honor, to the substitution of the photostat for the original.

THE COURT: All right.

MR. WALTER: May we at this time introduce this statement into evidence?

THE COURT: May you what?

MR. WALTER: May we at this time profert this statement into evidence?

THE COURT: It is marked as Exhibit 1.

MR. WOODS: May I ask a couple of questions, your Honor?

THE COURT: Yes, you may.

MR. WOODS: The statement here, Mr. Cashen, was procured by you from Mr. Kavanagh?

A Yes.

MR. WOODS: I notice it is typewritten in two paragraphs [13] and at the bottom is written in longhand "This statement is correct." and then it is signed in ink "Giles Kavanagh". Did Mr. Kavanagh sign that in your presence?

A No.

MR. WOODS: Who prepared the two typewritten paragraphs? Do you know that?

A It was prepared in our office, Mr. Platt and myself.

Do you want to know the circumstances of how --

MR. WOODS: Yes.

A We went before Mr. Lynch --

MR. WOODS: Who is "we"?

A Mr. Platt and myself.

MR. WOODS: He is an attorney, is he?

A Joseph Platt, he is an attorney. He worked with me on this case. He is out of Columbus, Ohio.

We went before Mr. Lynch of the Department of Justice and at that time we had with us the affidavit of Snider.

MR. WOODS: You mean the attorney, Norman Snider?

A Norman Snider. And Lynch suggested that we get a statement from Giles Kavanagh.

We had told all along that Giles Kavanagh had promised or had told Norman Snider that the doctor was free to turn over his books, that this was to be a civil case, and Lynch said to us "If that is true, why don't you get some sort of a statement?" So when we got back to Detroit, Giles Kavanagh was at his summer home up in the northern part of Michigan, [14] and I called him up and he said "Yes", he would give us a statement.

THE COURT: He said what?

A He would give us a statement.

So it was during the discussion with Platt -- now, I don't remember, it is quite a while back -- but we forwarded this statement up to him and he wrote "This statement is correct" and sent it back to us.

MR. WOODS: You had some discussion of the matters set forth in this statement with Mr. Kavanagh previously?

A Oh, yes.

MR. WOODS: And he had told you previously, then, that he had understood he had no authority to promise any immunity in a criminal case, isn't that correct?

A Yes. You see, Mr. Wood, --

MR. WOODS: Woods.

A -- Woods, I had several discussions with Mr. Kavanagh about his telling Norman Snider that the doctor was free to turn over the books.

As a matter of fact, when I first heard it, I didn't believe it, and I told Mr. Grunewald and I told McFarlane, I told Krieger and I told Sullivan.

MR. WOODS: Those are Internal Revenue men?

A These were Internal Revenue men who were working on the case.

Anybody that had anything to do with the case I told them [15] that Dr. Biggs claimed to me that he turned over the books after Norman Snider, his attorney, had gone and talked to Giles Kavanagh.

MR. WOODS: Now, did Mr. Snider make that claim to you, or did Mr. Biggs?

A I never talked to Mr. Snider.

MR. WOODS: Mr. Biggs made that claim to you?

A Dr. Biggs made that claim to us after I had been in the case, oh, I would say, better than a year. Wait a minute, after I had been in the case -- after Platt had come in, we really got to the bottom of this case of what happened here.

Dr. Biggs was hard to handle and I could never get anywhere with him, and when I got Platt into the case, why, we finally got to the bottom of this as to just what happened.

MR. WOODS: And you say that this affidavit or statement which had been marked Petitioner's proposed Exhibit No. 1 is the sum and substance of the truth of the matter that happened?

A That's right. We got that at the suggestion and instance of Mr. Lynch of the Department of Justice. He was a member of the Department of Justice for a while.

MR. WOODS: I notice this has no date on it, Mr. Cashen.

A That's right.

MR. WOODS: When was it?

A It was prepared in the summer of '52, I believe.

[16] MR. WOODS: You were still counsel for the Petitioner?

A I was still counsel. That's the reason I would know, because I was not the counsel in the summer of '53. I link that up in this way: that he was indicted in '53. I heard Mr. Walter say this morning that he was indicted in '53, so it was the summer before he was indicted.

MR. WOODS: You and Mr. Platt prepared this, is that correct?

A That's right.

MR. WOODS: In preparing that, Mr. Cashen, in bringing the substance of the conversations that apparently the Petitioner has had with Mr. Kavanagh into these two concise statements of fact, in these two paragraphs of this statement, you prepared it, did you not, in the tenor that you knew at the time that Kavanagh had not promised immunity to the Petitioner?

A I never knew that there was any immunity promised to anybody. I understood that Mr. Kavanagh told him that this was a civil case and that he relied upon it being a civil case and he turned over the books.

MR. WOODS: That is all the questioning we have on the statement, your Honor.

I have no objection.

MR. WALTER: May we have this admitted in evidence? There is no objection. May it be received?

THE COURT: Yes.

[17] Q (By Mr. Walter) One question regarding this document: The conversations which you had previously had with Mr. Kavanagh prior to the consideration of this statement are reflected in this statement and you used that information in preparing it for submission to Mr. Kavanagh, isn't that correct?

A I will have to say that that was true, because that is so far back that I don't know. I know that we had conferences with Mr. Kavanagh and I know we had discussions when we prepared that statement and I will have to say that I thought it was true, but I don't know, because it is so far back.

Q Thank you. Now, in the spring of 1952, did you also prepare an affidavit for the signature of Norman Snider?

A Yes. What I mean, in conjunction with Mr. Platt.

(An Affidavit of Norman Snider was thereupon marked Petitioner's Exhibit No. 2, for identification, by the reporter.)

Q (By Mr. Walter) Handing you what has been marked as Petitioner's Exhibit 2 for identification, will you please identify that for the record? (Handing exhibit to the witness.)

A I believe that we prepared this affidavit.

Q And was that affidavit also submitted to Mr. Lynch about the time of the submission of what has been marked as Petitioner's Exhibit No. 1 was submitted to him?

A This affidavit, it now comes back to me, -- this affidavit was submitted to Mr. Lynch. I wasn't there then.

[18] THE COURT: Just a minute, before we get much further on this questioning on this exhibit. The witness testified that "we prepared this affidavit" and the Court is left in the dark who it was besides this witness who prepared it.

Q (By Mr. Walter) Will you state to the Court who prepared the affidavit?

A Joseph Platt of Columbus, Ohio was the co-counsel with me, and when I use the word "we" I mean Mr. Platt and myself.

MR. WALTER: May we have leave to substitute a photostat copy of the original affidavit?

MR. WOODS: The Government has no objection to the substitution of the photostat of the proposed Exhibit 2, your Honor.

THE COURT: All right.

MR. WALTER: May we offer this into evidence, your Honor?

MR. WOODS: We will object to it at this time for the reason that if Mr. Snider is here at this time we would like to hear from Mr. Snider as to whether or not the statements as set forth in the affidavit itself are correct statements, and --

THE COURT: Is Mr. Snider going to be placed on the stand?

MR. WALTER: Yes, he is going to be placed on the stand.

[19] THE COURT: Well, I think we ought to wait until Mr. Snider is on the witness stand.

MR. WALTER: All right.

Q (By Mr. Walter) After the affidavit was prepared and executed by Mr. Snider, what did you do with the affidavit?

A I believe that that affidavit was prepared to take to Mr. Lynch in Washington. Mr. Lynch was either with the Department of Justice or with the Special Intelligence Unit in Washington. I believe that either Mr. Platt or Mr. Doyle took that affidavit down to him, and --

MR. WOODS: Just a minute. You don't know, do you, Mr. Cashen?

A I don't know.

MR. WOODS: All right.

Q (By Mr. Walter) But as the result of that conference and the

submission of the affidavit, the request was made for a statement from Giles Kavanagh and that produced Exhibit 1, isn't that right?

A That's right.

MR. WALTER: That's all from Mr. Cashen.

THE COURT: I want to call attention to counsel in the case that Mr. Walter, counsel for the Petitioner, has been asking quite leading questions.

MR. WOODS: I am aware of it, your Honor.

THE COURT: And there have been no objections from the [20] other side.

MR. WOODS: We have a very respected member of the Bar on the witness stand, your Honor, and we want to find out the truth of the matter, and if we can facilitate it by leading questions that are not otherwise objectionable, the Government had not intended to object to Mr. Cashen's interrogation.

THE COURT: The Court feels that the Court ought to call counsel's attention to that fact.

Now, counsel may have information that may serve in good stead, I don't know as of this moment.

MR. WOODS: Thank you, your Honor.

CROSS EXAMINATION

BY MR. WOODS:

Q You represented Dr. Biggs from sometime, you say, in the spring of '49 until 1942 -- '52, is that correct?

A I believe it was in the spring of '49, and I think it was -- we

were dismissed after he was indicted here in '53, I think it was.

(An Affidavit of Dr. Raymond A. Biggs was marked for identification Government's Exhibit No. 3 by the reporter.)

Q (By Mr. Woods) I show you, Mr. Cashen, Government's proposed Exhibit No. 3, which purports to be an affidavit, and I will ask you whether or not on the third day of February, 1950 you had occasion to take [21] the affidavit of Dr. Raymond A. Biggs, the petitioner in this case?

A I prepared this affidavit.

Do you want to know the circumstances under which this --

Q Just a moment.

A Okay.

Q This was drawn by yourself, Mr. Platt, or both of you?

A No, by myself.

Q Where?

A At my office.

Q And this was during the preiod of time, was it not, when you were representing Dr. Biggs?

A That's right.

Q And it was taken and subscribed to by Dr. Biggs during that period of your employment?

A That's right.

Q Does that statement accurately recite these questions that were asked by you and the answers that were given by your client, Dr. Biggs, on that occasion, and is it a true and accurate affidavit of the situation on the date that it was taken?

A No, it is not.

Q All right.

A Can I explain it?

Q I am anxious to inquire into it. Why is it not a true and accurate a statement or affidavit of Dr. Biggs on that occasion? It bears [22] his signature, does it not?

A That's right

Q It was prepared by you?

A That's right.

Q It was read by you before you gave it to Dr. Biggs?

A That, I don't think I did.

Q Is that not the affidavit you gave to Dr. Biggs to sign?

A Yes.

Q And you are saying that though it is the affidavit you gave Dr. Biggs to sign, that it is not accurate?

A That's right.

Q Although it was prepared by you?

A That's right.

Q And you have allowed him to sign it?

A That's right. I say it is not accurate now, but at that time I believed it was accurate.

Q Why do you have occasion to believe now it was not accurate at that time?

A Well, you see, at the time I prepared this affidavit it was from information that I had gathered from talking to either Grunewald, John

Sullivan, Jim McFarlane or Byron Krieger. I didn't get any of those statements from Dr. Biggs.

Q Yet it purports to be the affidavit of Dr. Biggs?

A That's right.

Q How do you explain that?

[23] A What happened on that is this: I never could get along with Dr. Biggs. I never could get him to get into the office so that I could get any information from him. He kept telling me that at the proper time he would tell everything. And then in my associations and my contacts with Sullivan, Krieger and McFarlane and Grunewald, growing out of this case, and all of the information that I could find, I was satisfied at the time that I prepared that affidavit that that is how the books were given up.

Q But the affidavit did correctly reflect the facts?

A That's right, I was satisfied at that time that that was true, not from any statement that Dr. Biggs had given me, but from what I had been able to find out from, as I say, the various ones connected with the case. Just who now, I don't know.

Q But you had Dr. Biggs come in and sign this, did you not?

A Yes.

Q He read it before he signed it, did he not?

A I believe he did. I don't know whether he did or not.

Q I see it is purportedly subscribed and sworn to on the 3rd day of February, 1950, before one Mary Kocoves.

A Kocoves.

Q She works in your office?

A Yes.

Q It is signed "Raymond A. Biggs." So he signed it and swore to it in your office?

[24] A That's right.

Q Were you present at that time?

A I don't know whether I was present when he signed it or not. As I say, anything that you've got to do with Dr. Biggs, you had to wait until almost six o'clock, and when he came into the office, the telephone --

Q (Interposing) Let's get to the pertinent part.

A Well, I think this is quite pertinent, if you'll let me tell it. The telephone would ring and he would be talking to people on the telephone and you never got any information out of him.

Q Did you have any discussion with him about this affidavit before you gave it to him for signature?

A That, I don't know, whether I had any discussion with him or not. I don't know whether I had any discussion with him or not.

Q You don't ordinarily have, in any event, do you?

A Well, I'll tell you. In this particular case, as my memory comes back to me now, that affidavit was given when McFarlane told me that the case was going forward and that if I wanted to do anything I had to do it within a very short time.

Q Let us get back to the affidavit here. As I understand, this affidavit was prepared by you?

A That's right.

Q Verbatim?

A That's right.

[25] Q Two pages, from information, setting forth the facts as you correctly understood them to be?

A Yes.

Q At the time, at the date of this affidavit?

A That's right.

Q Which is signed by your then client, the Petitioner here, Dr. Biggs?

A Dr. Biggs.

Q And that the Petitioner did come into your office and you don't recall whether you had a discussion with him about what was said in this affidavit, but none-the-less you let him sign it and he did sign it; is that correct?

A That's correct. I was satisfied at that particular time that that is how the books were obtained by the Government.

Q Did Dr. Biggs say to you at the time of the signing of this affidavit or any short period thereafter, that the facts as set forth in the affidavit which he signed were not true?

A Yes, yes.

Q When?

A After -- we had quite a battle over that. After Platt got in the case --

Q When was this in point of time as to the date of this affidavit?

A I would say four or five, six months after.

Q Only four or five or six months after, then, did Dr. Biggs tell

you that this did not correctly represent the facts, is that it?

[26] A That's correct.

Q All right, what was the conversation with the Petitioner at that time as to the correctness of this affidavit?

A I got Platt into the case to help me and we set out to find out just the whole story and he had to spend some time in Detroit. As I say, the doctor was awful hard to handle, and finally we got the doctor down to the office and then he finally gave us the entire story as is set forth in Norman Snider's affidavit.

Q When was Norman Snider's affidavit taken, as represented by the exhibit?

A I don't know.

Q Is it correct it is the 5th day of June, 1952?

A Yes, that is right.

Q Or is that some two and one-half years after the affidavit?

A Well, then it was a lot longer after that affidavit was made that Dr. Biggs told me that that affidavit was wrong. We finally found out what the truth was, but it was after Joe Platt got into the case and we had spent --

Q When did Mr. Platt get into the case?

A That, I don't know.

Q I'm trying to pin down, Mr. Cashen, --

A Yes, I know, and I'm trying to help you.

Q When, in point of time, after the date of this affidavit which is the 3rd of February, 1950, did Dr. Biggs come to you and say that "that affidavit which was prepared by you who were my counsel at that time, and

[27] which I signed and swore to in your office, is not the correct fact"?

A Well, it did not happen just like that. We finally got Dr. Biggs in. Now, you asked me the question when Platt came in with me.

Q Well, only from the standpoint of helping you determine what it was Dr. Biggs told you.

A Well, it was so long, I'm having -- I can't tell you when Platt came into the case. The only thing I can tell you is this: After Platt got into this case we made up our minds to get the facts from Dr. Biggs or get out of the case. He had as much trouble as I did at first, then finally we got him into the office --

Q When you made up your mind, as you say, to get the correct facts from Dr. Biggs, had you at that point already gotten the affidavit from Norman Snider?

A Oh, no, no.

Q You had not?

A No.

Q Was it, in point of time, about the same time?

A That might be it, maybe just before that or maybe just shortly before that that we finally got Dr. Biggs into the office.

Q When?

A Well, that, I don't know. And we spent some time with him and finally we got the entire story out of him and then there came the case [28] of -- well, the affidavit that we had filed with Mr. Grunewald back sometime back, and then of course he and I got into a tirade claiming that that was all wrong.

Q When was that? Was that approximately in the summer of '52?

A Well, that, I can't tell you.

Q Approximately, then?

A I have no way of fixing it when we finally --

Q When were you relieved of being counsel for Dr. Biggs?

A Right after they were indicted.

Q In 1953?

A '53.

Q March, of 1953. When, in point of the indictment time were you relieved as counsel? Did Dr. Biggs tell you that this first affidavit was not correct?

A That, I can't tell you. It was growing out -- finally we got the facts from Dr. Biggs, and the only time we had ever been able to get any facts from him, and it was at that time that we found out that this affidavit I had filed in here was absolutely wrong.

Q Let me put it to you this way, then, Mr. Cashen; After this conversation with Dr. Biggs, when apparently it was determined by you, from what Dr. Biggs told you, that this affidavit, Government's proposed Exhibit No. 3, was not correct, did you then take immediate steps to get the affidavit from Snider?

A Yes.

[29] Q All right, then that would place that date, would it not, sometime in the summer of 1952, if the affidavit of Snider bears the date of the 5th of June, 1952?

A Yes, sometime in the spring or summer of '52, yes.

Q So that after representing the petitioner here and Dr. Biggs from 1949 up until sometime in March of 1953, and after having drawn an affidavit and having procured his signature to it, which he swore to it, on the 3rd of February, 1950, for something over two years and something a shade less than two and one-half years, Dr. Biggs never had told you at any time that the affidavit was incorrect?

A. No, he didn't. I don't think Dr. Biggs ever recalled that affidavit. And if he read it, he never --

THE COURT: Wait a minute. How can you say that Dr. Biggs hadn't recalled? That's a mental process, isn't it?

Q (By Mr. Woods) Do you mean recalled, Mr. Cashen, in the sense that he issued an out-and-out denial of the truth of its contents, or do you mean recalled to tell you to give back to him? How do you mean that statement?

A Well, I meant this. Dr. Biggs always contended that Mr. Sullivan and Mr. Krieger asked him for the books. Even now, as I understand, he still contends that.

Q In other words, up until the time of your relief as counsel in March of 1953, had you ever had a claim made to you by the Petitioner that he was relying on any so-called promise of immunity from Giles Kavanagh, [30] the Collector of Internal Revenue?

A I never knew there was a question of immunity at all. What I found out, and we spent some time on it, and I talked to the Revenue Agents and I talked to Kavanagh on it, was that Kavanagh informed him that this

was a civil case and that he should turn over the books.

Q Dr. Biggs told you that?

A Yes.

Q Was that about the same time that you secured this affidavit from Snider?

A Yes, some time in there. I don't know as to time now.

Q But for two and one-half years you were unaware of it from the Petitioner himself?

A That's right.

Q And the sole thing that the Petitioner alleged to you for that period of 1949 up until 1952, some three years, was that the only reason he turned over the books was because of Revenue Agent Krieger or Special Agent Sullivan, is that correct?

A No, that isn't true. That is not what I said.

Q All right.

A I never had any further discussion with the doctor as to how these books were surrendered. My part to oppose this particular case was. We opposed it because of this 90-day letter that had been sent out and it was all a legal problem rather than any factual setup.

[31] Q Well, you represented him for all purposes and intents?

A That's right, I represented him for all purposes.

Q You succeeded Mr. Snider, did you not, as his counsel?

A That's right.

Q Now, when Dr. Biggs came to you as your client, you were aware of the fact that some time after he had been initially contacted by the

agents and was made aware of the fact that an investigation was being conducted of his financial affairs, that some time after that initial point he did in fact turn over these two Lawyers Hand Books?

A That's right.

Q Did you not have any conversation with Dr. Biggs then or about the time of your first employment or when you came into the employment with Dr. Biggs as to how those books happened to be turned over?

A Surprising as it may seem, the only statement that I could get from Dr. Biggs at that time was: "At the proper time, when the proper time came I will tell." He would not tell me.

Q What was his reason?

A He wouldn't offer any reason.

Q Did you ask him why the books were turned over once or more than once?

A I asked him several times, and he said "When the proper time comes, I'll talk". At that particular time the Revenue Agents and the Special Agents who were working the case -- and they didn't know. Of [32] course, their stock phrase is: "We don't know. Your client might have a refund." And I tried to associate with them to get with them as often as possible, and I had no particular contact with Dr. Biggs.

Q All right, let us go back, Mr. Cashen, to the time you came into his employment. You say in the spring of '49?

A That's right.

Q So that must be shortly after these two so-called Lawyers Handy Books were turned over to the agents, is that not correct?

A That is correct.

Q What discussion did you have with Dr. Biggs when you came into his employment as to who was investigating him or to whom he has talked from the Revenue Department?

A Well, I don't know whether he told me or whether the agents told me, but he told me that he had this tax case.

Q What did he say about that?

A About the tax case?

Q Yes, when he came to you.

A He didn't say very, very much. He told me he had this tax case and I asked him who was working it and he said "I think John Sullivan was working it."

Q You knew where Sullivan was from, did you not?

A I knew Sullivan. I knew Sullivan real well.

Q Dr. Biggs knew who Sullivan was, did he not?

A I don't know how well Dr. Biggs knew Sullivan.

[33] Q I don't mean personally, but I mean he knew who he was, from whence he came, what department he belonged to, is that correct?

A Yes; sure.

Q Now, he mentioned Sullivan. Who else did he mention?

A I don't know. I think he mentioned Krieger, Sullivan and Krieger

Q Krieger is also from the Treasury?

A Well, he used to call it Revenue Agent and Special Intelligence.

Q Now, there is a special distinction between Mr. Krieger and

Mr. Sullivan even though they are both from the Treasury Department, is that not true?

A That's right.

Q What is the difference, as you understand it, and as Dr. Biggs understood it?

A I don't know what it is today, but under the old setup Mr. Krieger was under George Neal of the Revenue Department.

Q He was a Revenue Agent?

A He was a Revenue Agent.

Q And Mr. Sullivan?

A Mr. Sullivan was under Al Grunewald of the Special Agents Department.

Q That is the Intelligence Department?

A That's the Intelligence Department.

Q What cases do they handle?

A Criminal.

[34] Q Criminal fraud cases, is that not right?

A That's right.

Q And Dr. Biggs in this early occasion of 1949 had mentioned that Special Agent Sullivan, Special Agent Krieger had been investigating into his affairs, is that right?

A That is right.

Q All right, what other facets of this investigation were discussed by Dr. Biggs with you?

A I don't think that there were any because we were only working

on the investigation at that time.

MR. WOODS: The Government would like to move at this time for the admission into evidence of the Government's proposed Exhibit No. 3.

(Handing exhibit to Mr. Walter.)

MR. WALTER: Your Honor, we have no objection to its being received.

THE COURT: It may be received.

MR. WOODS: Thank you.

Will you mark this Government's Exhibit No. 4?

(A photostatic copy of Affidavit of Raymond A. Biggs was marked for identification as Government's Exhibit No. 4 by the reporter.)

Q (By Mr. Woods) I will show you, Mr. Cashen, Government's proposed Exhibit No. 4 which purports to be an affidavit and ask you whether or not on the 27th day of February, 1951, you had the occasion to [35] take another affidavit of the Petitioner, Dr. Biggs?

MR. WALTER: What date was that, Mr. Woods?

MR. WOODS: February 27, 1951.

MR. WALTER: I haven't seen that. After it is identified, you mind my taking a look at it?

MR. WOODS: Yes.

A Yes.

Q (By Mr. Woods) The answer was Yes?

A What was your question?

Q That on the 27th day of February, 1951, you took yet a second affidavit of Dr. Biggs?

A That was prepared by Mr. Platt in my presence.

Q Does that represent a true and accurate --

A I can't tell you whether it is true. I have no idea. It is four years ago since I've seen it.

MR. WOODS: Well, let me show it to Mr. Walter and then you can take a look at it afterwards (handing exhibit to Mr. Walter).

(Short intermission while Mr. Walter examines Exhibit 4.)

THE COURT: Are you ready to proceed?

MR. WOODS: Yes, your Honor.

Excuse me, Mr. Walter, I didn't mean to interrupt your reading of the affidavit.

[36] MR. WALTER: We are finished and we have no objection.

THE COURT: It may be received.

MR. WOODS: We offer it in evidence, and may it be received, your Honor?

THE COURT: It may be received.

MR. WOODS: Now, Mr. Walter has consented to the proposed Exhibit No. 4 which is a photostat of the original, which is in the Regional Counsel's Office in Chicago of the Internal Revenue Department.

MR. WALTER: We have no objection to it at all. It is a copy.

THE COURT: Very well, it may be so done.

MR. WOODS: Thank you.

Q (By Mr Woods) I would like to have you read that, Mr. Cashen, and tell me under what circumstances the second affidavit of the Petitioner was taken?

A (After reading affidavit.) What was your question?

Q Why was this second affidavit taken, Mr. Cashen?

A Why was it taken?

Q Yes.

A It was the story that we got from Dr. Biggs as to the facts surrounding the surrendering of these books, how these books happened to be surrendered.

Q Although a year prior to the date of this second affidavit -- the first affidavit you have there, did assist you for that period of time, isn't that correct?

[37] A I again say that that was my understanding of how the books were -- whether that was Dr. Biggs', I don't know. But I have prepared that affidavit and I have taken full responsibility for it.

Q But you didn't sign it?

A No, I didn't sign it.

Q And you didn't swear to it before you signed it?

A No, but I told Mr. Fulsom (?) right there that I prepared it and that it was wrong and that I was sorry.

Q Was this second affidavit prepared the same way as this first one?

A This second affidavit was prepared by Platt, and the notes and

the story were given to him by Dr. Biggs. We had spent a whole day with Dr. Biggs.

Q What discussion did you have with Dr. Biggs in regard to the story of the first affidavit, about its inaccuracies?

A Well, then we got into a battle of -- he said he didn't read it, I believe, and then I said to him --

Q Just a moment, repeat that.

THE COURT: I didn't get that. "We didn't," -- what?

A He said "I don't believe I read that," and I said, "You should have read it," and we got into a heated battle over that, and we got to a point where we were going to terminate our employment as his counsel. [38] At least I was, because I was satisfied, or I would have never made it, when I made that first affidavit, that that was the way the books were surrendered. I had no reason to lie or to help him in any way, and I was associating at that time with the Revenue men and with Grunewald in connection with this case, and that is what I understood was the method in which the books were surrendered when the affidavit was made.

Q (By Mr. Woods) Let us look at that affidavit again. There is one statement in here that reads like this: -- This is next to the last paragraph, Mr. Walter.

"Deponent further says, that he did not turn the books over to the Government on his own free will and waive any privilege of immunity, but turned over these books and records to Agent Sullivan solely upon his promise and agreement that said investigation was not of a criminal nature, and that he

had nothing to fear from any information these books might disclose."

From whom did you get that statement, was it not from Dr. Biggs?

A No, no, I don't know who I got it from now, but I did not get it from Dr. Biggs.

Q You admit that the tenor of the statement is one that reads like it would have come from Dr. Biggs?

A It is somewhat parallel or synonymous --

Q To the whole affidavit?

[39] A To the whole affidavit, to the big affidavit.

Q The second affidavit varies materially, does it not, from the first affidavit?

A Are you calling this the second affidavit (indicating)?

Q Yes, the second affidavit is Government's Exhibit No. 4.

A Yes, the second one varies in this respect, in that it says that Snider contacted Kavanagh and through his understanding with Kavanagh the books were surrendered. That is the variance.

Q During this year's time, and it was about a year, as borne out by the dates on those two affidavits, were you in more or less the usual constant contact that an attorney is with his client in a case of that nature at that time?

A No, I had no constant contact with Dr. Biggs.

Q You saw him on numerous occasions in any event, did you not?

A No, I didn't; no, I didn't. It was not a case where I could

report anything to him. It was a case where I was working on this case and finally I went to him and told him I had to have some help and he then submitted it to Jim Watkins and Platt was brought into the picture.

Q Why was that necessary, did you feel?

A I felt, first of all, that the case was too big for me; and, secondly, the case was going ahead and --

Q Didn't that necessitate your seeing Dr. Biggs during that year's time?

[40] A You couldn't -- I couldn't -- I don't think I could today. I never could get anything out of Dr. Biggs. I could never sit down and talk to him and go over things with him like I can --

Q Anyway, you did not get the full story from him on the date of the first affidavit, did you?

A That's right, that's right. I've told the Government all through this case that I did not get this story from him when that affidavit was filed.

Q I see. You, of course, Mr. Cashen, were aware, when you came into the case in the spring of 1949, that Mr. Sullivan, being of the Intelligence Unit, Special Agent under that Unit, that this case was not definitely closed out from the criminal aspects; did you not?

A I knew that Mr. Sullivan was working on it.

Q You knew that Mr. Sullivan was a criminal fraud man, did you not, under Special Intelligence?

A Sure, sure, I knew this case was under Mr. Grunewald.

Q Dr. Biggs apparently, from your testimony, told you that Revenue Agent Krieger and Agent Sullivan, the Special Agent out of the

Intelligence Unit, had been investigating him, and he knew from which offices they came, did he not?

A That, I don't know I don't know as he knew the difference. Dr Biggs was under the impression that Giles Kavanagh was boss over everybody.

Q Oh? And when did he tell you that, the date of the second [41] affidavit?

A No, he told us that -- I don't know just the exact date, or when it was, but one time we had a conference with Platt and myself and Dr. Biggs came out with that statement:

"Well, Mr. Kavanagh is the chief one in Wayne County, isn't he?"

And we then corrected him. I recall that.

Q You don't recall when that would be in point of time from the dates of either of these affidavits?

A No, no, this is so far back now.

THE COURT: We'll take a ten minute recess at this time.

(Recess.)

THE COURT: The Court is now in session.

MR. WOODS: May I proceed now, your Honor?

THE COURT: Yes, you may proceed.

(Mr. Cashen resumed the witness stand after recess and the following is a continuation of the cross examination by Mr. Woods.)

Q (By Mr. Woods) In the preparation of the first affidavit,

Exhibit No. 3, Mr. Cashen, that which is recited thereon, you say you procured from others than Dr. Biggs; is that correct?

A Can I see the papers so that I will know what you are talking about, when you use the words "Exhibit 3".

MR. WOODS: Yes.

[42] THE COURT: That was Dr. Biggs' affidavit that you prepared at your office.

(Mr. Woods handed Exhibit 3 to Mr. Cashen.)

THE WITNESS: Can I have that question over again, please?

Q (By Mr. Woods) You have previously stated, Mr. Cashen, that the data on this affidavit, Government's Exhibit No. 3, was put there by you and procured by you from those persons other than Dr. Biggs?

A That's right.

Q All right, who were those persons?

A Well, I can't tell you exactly wno they are any more than that they were John Sullivan, Byron Krieger, McFarlane, Al Grunewald, and maybe some of the others that I talked to in the Bureau because I was looking --

Q All right, let us stop there for a moment.

A Okay.

Q That would encompass all of the witnesses -- that is, those people in the Treasury you had mentioned?

A That's right.

Q Would there be anybody outside of those individuals?

A Well, that, I would not know. You mean outside of the Treasury Department?

Q Yes, outside of the people you named.

A There might be, but not outside of the Treasury Department [43] because I talked to other revenue agents.

Q In any event, those witnesses to whom you have referred, that you secured this information, would be in the Treasury Department?

A Would be working for the Government; yes.

Q All right. Now, looking back to this affidavit, in this next to the last paragraph, could you possibly tell us who in the Treasury Department, and these witnesses being confined to the Treasury Department personnel, who in the Treasury Department made this statement to you, that he, Dr. Biggs, did not turn the books over to the Government on his own free will and waived any privilege of immunity, had turned over the books and records to Agent Sullivan solely upon his promise and agreement that said investigation was not of a criminal nature and that he had nothing to fear from any information these books might disclose? Now, who would give you that information in the Treasury Department?

A I don't know now. That was five years ago.

Q Are you going to tell us, Mr. Cashen, that someone in the Treasury Department made that statement to you?

A That was the information I got.

Q Did you not get that statement from Dr. Biggs?

A No, no.

Q Did Agent Sullivan give you that?

[44] A I don't know.

Q How about Revenue Agent Krieger?

A I don't know.

Q How about Mr. Grunewald?

A I don't know.

Q Who was Mr. Grunewald, by the way?

A He was the head of the Special Intelligence Unit.

Q Chief, Intelligence Unit, is that right, Criminal Fraud Section?

A That's right; yes.

Q He is now deceased, is he not?

A That's right.

Q Are there any other agents who would have given you that statement you just read?

A I don't know. As I say, I just tried to get whatever information I could from him.

Q Could you state unequivocally that Dr. Biggs did not make that statement?

A Yes. The reason that I can state that is because of the big turmoil that followed when Platt and I spent the day with him.

Q At the time of the second affidavit?

A At the time of the second affidavit. When I said to him, "wait a minute" -- that's what followed up, and I said to him "Wait a minute, that is the impression I had at the time I prepared it."

[45] Q Then, most assuredly, that statement must have come from one of the Treasury Agents and the personnel themselves who confided ...

you, did they, that Sullivan had promised this man immunity?

A No one ever confided anything to me. No one ever talked to me. I know those fellows real well, and they are all good agents.

Q That is quite a positive remark, is it not, Mr. Cashen?

A But from time to time they let little things drop. It might have been in a kidding way, but they let little things drop and that's where I picked up a lot of my information.

Q Do you say, in a kidding way somebody told you in the Treasury Department that Sullivan promised immunity?

A I don't know now, but I do know that I discussed this with Mr. Grunewald in their presence --

Q Nothing was said about immunity at that time, was there?

A I don't believe that anybody ever claimed immunity.

Q What does that statement say there?

A That is what I had at that particular time.

Q We are still trying to find out from who you got it?

A I don't know. I wish I could tell you, but it is so far back I cannot recall.

MR. WOODS: Your witness, counsel.

[46] REDIRECT EXAMINATION

BY MR. WALTER:

Q During your cross examination you mentioned the fact that a 90-day letter was received by the Petitioner, Dr. Biggs. Can you recall whether that was received on or about March 8, 1950?

MR. WOODS: Just a moment. I gather from counsel's

question that he proposes to develop from this witness, your Honor, testimony pertaining to the issuance of a 90-day letter which, from the framing of his question, was issued in March of 1950, the 8th day. This, your Honor, strikes the Government, and from the pleadings themselves filed by the Petitioner, is a motion to suppress, based upon a so-called promise of immunity, in effect, which, according to the pleadings and from what small estimony has developed to this point, took place some time in the very, very early part of 1949, or subsequent to the 13th of December, 1948, up to the 24th of February, 1949.

Now, then, if this hearing is directed, on the hearing of the motion to suppress these books, based on that promise of immunity, the Government cannot see how any inquiry directed to the issuance of a 90-day letter, some year -- fifteen or sixteen months later, has any pertinency to this, and we might be here a half a day discussing a 90-day letter that is not relevant.

THE COURT: The record up to now definitely indicates when Petitioner claimed immunity?

[47] MR. WOODS: It does, to this extent, your Honor: The books and records were turned over February 24th or -3rd --

MR. WALTER: 24th.

MR. WOODS: -- 24th, 1949. Now, those same books and records were turned over to the Government Agents only, as claimed by the Petitioner, on the representation that it was a civil suit and not a criminal suit. So, consequently, anything bearing upon the pertinency of this motion to suppress on the claim of the promise of immunity that had

been given to this Petitioner had to take place prior to February 24th, 1949. How can any 90-day letter in March of 1950 have any relevancy or pertinency to the Court at this time?

THE COURT: The Court does not know unless it learns by the proceeding here the claim of one side or the other put into the record. The Court cannot tell.

MR. WOODS: Well, perhaps counsel can edify the Government and the Court both as to how something that took place over a year after the act they complained of has any pertinency here.

THE COURT: What was the last question?

(The last question was repeated by the reporter as follows:

"Q During your cross examination you mentioned the fact that a 90-day letter was received by the Petitioner, Dr. Biggs. Can you recall whether that was received on or about March 8, 1950?")

[48] THE COURT: Well, under the circumstances, I gather that was a part of the direct examination and any cross examination on that may be had except the Court will rule that counsel for Petitioner does not have a right to submit to the witness leading questions.

MR. WOODS: But this, your Honor, is this man's witness and this is re-direct testimony by the Petitioner's own witness. It is not cross examination into which he should be allowed to go. But it apparently is immaterial --

THE COURT: The Court understood that that was developed

in cross examination.

MR. WOODS: We did not inquire into that; no, sir.

MR. WALTER: Your Honor, there was a statement by the witness on cross examination that he had received a 90-day letter on behalf of the Petitioner, Dr. Biggs. Now, my question is to determine the time that that was received, your Honor.

THE COURT: Well, there is something in the record that I recall concerning a 90-day letter.

Now, do you remember that, Mr. Woods?

MR. WOODS: Yes, sir. It was not in response to a cross examination question. It was on a divergence by this witness, into which we made no inquiry because we did not consider it pertinent.

They could talk about, your Honor, the World Series that [49] just took place, but --

THE COURT: Well, what do you claim, Mr. Walter, the 90-day letter was?

MR. WALTER: We contend, your Honor, that the 90-day letter was a part of the civil process under the Internal Revenue Department Regulations; and, as a part of the Regulations, such a 90-day letter could not be issued as long as criminal prosecution was in contemplation, or if there was any question about criminal prosecution, that only after a decision was arrived at that there was no criminal prosecution was the Department authorized under its own regulations to issue such a 90-day letter.

We contend --

THE COURT: You have the 90-day letter?

MR. WALTER: We have a copy of the 90-day letter, yes.

The 90-day letter, your Honor, I can state was issued --

THE COURT: I want to see that letter. I want to know what it contains and what it stands for.

MR. WOODS: I fail to see how he can do it by this witness, either, your Honor.

THE COURT: Well, that is the very thing this Court is inquiring into. I don't know anything about the 90-day letter. I have never seen it either at the first hearing, that I recall, or at any time prior to this date.

MR. WOODS: Nor is it pleaded, your Honor.

[50] (Short intermission while Court examines 90-day letter.)

THE COURT: Do you have a copy of that letter, Mr. Woods?

MR. WOODS: Yes, sir.

THE COURT: Have you seen it personally?

MR. WOODS: I have seen it heretofore. I have not seen it in some time, your Honor. I do know that the date is March 8, 1950, is it not?

May I at this point, at the pain of being duplicitous, make one further point on this?

THE COURT: Yes.

MR. WOODS: As I see this letter in this line of inquiry, here is what it boils down to: We have got a motion to suppress evidence here, which is based solely on the contention by this petitioner --

THE COURT: That would have been my next question to counsel here in trying to determine the admissibility of this letter either as an exhibit or any part of these proceedings here, what do you claim for this counsel?

MR. WALTER: Your Honor, it is our contention that under the Regulations of the Internal Revenue Department, a 90-day letter will not issue until the criminal elements of the case are disposed of That was the regulation at the time and is still a regulation of the Department.

[51] In Section 601.105(g), entitled "Fraud". The procedure described in this section does not apply in any case in which criminal prosecution is under consideration Such procedure does obtain, however, in cases involving assertion of the civil fraud penalty after the criminal aspects of the case have been closed.

I wish to cite and ask you to take judicial notice of the hearings of the King Committee of September 10, 11 and 12, October 3rd, 4th, and so on, 1951, in which this statement was made by Commissioner Dunlap, the then Commissioner of Internal Revenue, in answer to a question by Mr. DeWind:

"Mr. Dunlap, you have expressed a present Bureau policy of deferring any steps to collect civil liability pending an investigation of criminal aspects of tax cases; is that a policy that has appeared to the Bureau entirely satisfactory, or has it posed any problem of ultimate tax collection?

COMMISSIONER DUNLAP: That was an ironclad policy, Mr. DeWind, up until I would say, the early

part of this year. Since that time it has been decided, after conference with the Department of Justice, that the policy should be deviated from, but only in those cases where delay in assessment would jeopardize the collection of the tax involved. So the policy has been amended to where we will [52] make jeopardy assessments where it is apparent that the taxpayer is attempting to dispose of his assets or is losing money in his business, or the collection of the tax might be jeopardized by the time the criminal case is completed."

During the entire time the policy was that no 90-day letter would be issued where criminal proceedings were contemplated, and it could not be issued until the criminal case was disposed of.

MR. WOODS: Your Honor, when he tells the Government how that which he has just read has any effect whatsoever on the state of mind of this defendant in 1949 when he turned over these books and records, then we will buy that. But he does not make any contention that this 90-day letter business went out before this man turned over these books and records so that his mind was influenced to the point that he voluntarily turned them over, relying upon the fact that there would be no criminal prosecution. He is talking about something that happened in 1950. We are only concerned here, your Honor, with whether or not he gets these Lawyer's Handy Books back and that evidence which was utilized by the Government in reference to them is to be suppressed or held intact, as we have used them, and not something in 1950 --

MR. WALTER: Your Honor, our contention is not that this

has anything to do with what the frame of mind of the Petitioner was before [53] he submitted the records. We say this is confirmatory of the fact that he had made arrangements to submit the books for civil examination and that the Department had come to the conclusion, following that assurance to him, that no criminal prosecution was going to be undertaken, and as a result had under its regulations issued a 90-day letter which was an indication to the taxpayer that the criminal phase has been exhausted.

And the regulations are clear that the 90-day letter could not be issued under the Department regulations if criminal action was still in contemplation.

MR. WOODS: Wait a minute. Let me see if I understand you correctly. Are you saying, then, that Dr. Biggs, sometime prior to February 24, 1949, knew of this regulation and that he knew that the 90-day --

MR. WALTER: I haven't so stated at all. I haven't stated that at all. I have very definitely stated to the Court that we are not talking about the state of mind of Dr. Biggs prior to February 24, 1949.

MR. WOODS: This is what the hearing is for.

MR. WALTER: This is evidentiary of the fact that the arrangement made with Dr. Biggs at that time was confirmed by the Department when the Department calls this a civil case and issues a 90-day letter in confirmation of that arrangement, and that is what we are putting that in for.

MR. WOODS: A wholly extraneous matter, your Honor.

[54] THE COURT: Is this the first time this 90-day letter was brought into these proceedings?

MR. WALTER: We have discussed the 90-day letter with the District Attorney's Office.

THE COURT: Now, we have had a hearing in this case before.

MR. WALTER: It never went to the merits before, your Honor. This letter was never discussed in the hearing before.

THE COURT: In whose possession was this letter on March 8, 1950, addressed to Dr Biggs?

MR WALTER: In possession of counsel in charge of the case at that time.

THE COURT: Well, which counsel? He has had a number of counsel since that time.

MR. WALTER: Mr. Cashen and Mr. Platt I think were the first who had that paper because it was sent to them at the time they represented him and during that time the civil aspects of the case were being discussed and negotiated.

THE COURT: Well, I think the Court would be interested in hearing from Mr. Cashen on the witness stand at this time as to what line of action was pursued by counsel for Dr. Biggs prior to the date of this letter? Was this a routine letter that was mailed to a taxpayer following certain action taken by the taxpayer? Certain proceedings had with the [55] Tax Department, the Treasury Department, or what was it? I don't know.

MR. WALTER: A 90-day letter, under the Department regulations, is the final step by the Internal Revenue Department in

determining its claim of civil liability. And this 90-day letter, under the law, once issued, gives the taxpayer a right under the law to appeal to the Tax Court and he must appeal within that 90-day period. This means that the civil negotiations, as far as the Internal Revenue negotiations are concerned, have come to a conclusion.

MR. WOODS: What has that got to do with his turning over of these records, your Honor, in February of 1949, a whole year --

THE COURT: I don't know. That is what this Court is here to find out, to get all of the facts.

MR. WOODS: That's true. But we can look at these pleadings, your Honor, and see that the motion itself is not directed, or encompasses any 90-day letter.

THE COURT: I suggested a moment ago that this particular letter, the so-called "90-day letter" of March 8, 1950, and Petitioner's counsel has confirmed it, that apparently up until now it has not been brought into these proceedings.

MR. WALTER: Because it was never heard on its merits prior to this time. The question has never been raised. It is evidentiary, in effect, your Honor, and is to confirm the arrangement that Dr. Biggs has made, as confirmed by the Department. That is the purpose of [36] this testimony in evidence.

If you will notice, the yellow sheet there advises the taxpayer that his time is here to appeal to the Tax Court; that he is through with the Revenue Department, on that yellow sheet that is attached to that letter.

THE COURT: Mr. Woods, let me ask you this: Is it your position that because this letter has not been brought into these proceedings at any time until the present time, and that apparently the Petitioner in this case has chosen to follow another line of conversations with the Government, Treasury Department, that it is not now admissible for anything?

MR. WOODS: That is my second objection, your Honor.

Appreciating, of course, that the Federal Rules provide enough elasticity so that this Court can go into matters that are not, oft times, properly pleaded with definiteness, in the first instance, - except my primary objection still remains, that this is a motion to suppress evidence. What evidence? Two Lawyer's Handy Books. How are these Handy Books important? Because they were turned over by this Petitioner on the 24th day of February, 1949. Why were they turned over? The Petitioner in his petition claims they were turned over for this reason: The only reason he would turn them over was that if he could be positively assured that there would be no criminal prosecution.

THE COURT: This letter, I take it, refers to a civil [57] proceedings?

MR. WOODS: Yes.

MR. WALTER: That letter states to the taxpayer "Your civil proceeding is finished with the Internal Revenue Department. This is your determination of taxes as claimed by the Department." And then notifies him that he can appeal within 90 days to the Tax Court if he is not satisfied with that determination.

Now the regulations of the Department say that that letter cannot be issued until determination is made as to a disposition of a criminal proceeding, and only after it is decided that the criminal proceedings will not be taken can this 90-day letter be issued by the Internal Revenue Department.

Now, the point I'm making is that this is evidentiary to confirm the fact that when Dr. Biggs turned over these books in February of 1949 in agreement that they were to be used for civil investigation only --

THE COURT: Have you any law as to who is to make the determination for the Treasury Department as to whether they will or will not institute any criminal proceedings?

MR. WALTER: Yes, I have the entire set of regulations that cover that point. I will be very glad to submit them to the Court and I can also cite to you in this series of hearings testimony by Commissioner Dunlap --

[58] THE COURT: Have you any law that will indicate -- I'm not ruling on that question at all -- that will indicate that an Internal Revenue Collector has the right to decide as to whether there will or will not be a criminal proceeding?

MR. WALTER: I can state to you that under the regulations --

MR. WOODS: (Interposing) Wait a minute. Answer that question.

THE COURT: We have a specific case here. I suppose you are relying on Mr. Kavanagh's statement and his signature over his statement that there would be no criminal proceedings against the taxpayer,

but only proceedings of a civil nature, if any at all?

MR. WALTER: That's right.

THE COURT: Find me that part of the regulations or whatever it is you have there.

MR. WALTER: The regulation is Section 601.105 (g).

THE COURT: What is that again?

MR. WALTER: Section 601.105 (g).

MR. WOODS: Is that a regulation, or what is it, Mr. Walter?

MR. WALTER: This is a regulation of the Internal Revenue Department issued first in procedural rules, Title 26, Part 601, Code of Federal Regulations.

THE COURT: When was that issued, that regulation?

[59] MR. WALTER: I believe that goes back to 1934. It's a very early regulation.

THE COURT: Is there any date in connection with that?

MR. WALTER: I haven't got the date here. I can find it for you.

It was issued this last summer in 24 Federal Register 127.

Now, this is the regulation. It says:

> "The procedure described in this section does not apply in any case in which criminal prosecution is under consideration. Such procedure does obtain, however, in cases involving the assertion of the civil fraud penalty after the criminal aspects of the case have been closed."

Now, that's the basic regulation.

THE COURT: Now, this Court doesn't know whether there were any preparations being made for criminal proceedings at that time. This Court doesn't know yet whether there were or not.

MR. WOODS: No.

MR. WALTER: I can only say, your Honor, from the testimony of Mr. Cashen, he has testified that one of the agents has said to him that they are looking into this situation and that that was the reason for the submission of the first affidavit in 1950, if you will recall, which is marked here as Exhibit 3, and it was for that reason that they submitted [60] to the Department the arrangement under which the books had been turned over for the civil examination. Now that occurred prior to the issuance of this 90-day letter of March 8, 1950.

THE COURT: When was the indictment handed down or brought in in this case?

MR. WALTER: It was made in March, 1953, three years after the 90-day letter was issued.

THE COURT: Well, do you know? You seem to know pretty much about this case.

MR. WALTER: I studied it pretty hard and I'm trying to give you all the information that I have as accurately as I can.

THE COURT: Do you know whether there were any preparations being made for the prosecution of Dr. Biggs three years earlier before the indictment was brought in?

MR. WALTER: I understand that there was, from what I

gathered, discussion about possible criminal prosecution before the 90-day letter was issued, and the 90-day letter was issued and then the case went to Tax Court, as required by law, if the Petitioner wanted to save his rights, and he filed that petition. After that period of time, whether discussion went on, and counsel for the Petitioner were advised that there were criminal discussions going on -- and that was the reason --

THE COURT: When?

[61] MR. WALTER: This was going on in 1951, the latter part of 1950, 1951, and then in 1952.

It was for that reason that Mr. Cashen had gone to Washington with Mr. Platt to talk to Mr. Lynch, to show him that there had been an agreement that only civil matters were being raised when the books were turned over.

There was an order to postpone the proceedings and have the decision in Washington to go ahead with the criminal proceeding; that this was going on during this period of time, and it was not until December of 1952 that the letters came out of Washington that indictment should proceed and that attempts should be made to obtain an indictment.

THE COURT: What are you relying on in this hearing for the protection of your client from prosecution or suppression of any evidence which may be in the Government's possession as the result of the turning over of these two books to the Treasury Department?

MR. WALTER: We are relying on the fact that in February of 1949 Dr Biggs was assured that only a civil investigation was going on; that if he had been aware that a criminal investigation was going on he

would not have turned over his books. But because he had been assured by Giles Kavanagh that all they wanted the books for was to facilitate the determination of the civil liability, and that he turned over the books only [62] for that reason. And it was in derogation of his constitutional rights that he was indicted through the use of those books. That's our contention.

MR. WOODS: Even at that, that letter doesn't say anything like that.

MR. WALTER: Wait. That letter, we claim, is completely evidentiary to confirm the fact that after this arrangement was made the Department proceeded to determine civil liability. And, in keeping with its own regulations, issued the 90-day letter, and the 90-day letter could not have been properly issued if they were still contemplating criminal proceedings.

We claim it confirms the fact that they asked for those books only for that limited purpose.

THE COURT: Do you know what act brought forth this letter to Dr. Biggs?

MR. WALTER: Under the regulations --

THE COURT: What act by the Treasury Agents or the Treasury Department?

MR. WALTER: When the Treasury Agents completed their investigation, they would gather together all of their figures and set forth what they claimed is the tax due, fix a penalty, and turn it over to the Regional Office, I understand, that makes a determination to issue this

letter, and after all of the facts are considered both in the Penal Section [63] which has the Fraud Section in it, and then the Civil Section, -- only when that is determined, under the regulations, can this letter be issued. And when that letter is issued it is a signification to the taxpayer that there is no criminal element involved and that he has only a civil issue to meet.

MR. WOODS: What you are saying is: That it is then, and only then, is that not right?

MR. WALTER: I am saying that it is then that the taxpayer is notified that there is no criminal proceeding, and it is then and only then that they can issue the 90-day letter, after the Department itself is satisfied that there should be no criminal indictment.

THE COURT: Is Mr. Neal going to be on the witness stand in this case?

MR. WOODS: I am not prepared for him to be here, your Honor.

THE COURT: Is he still in the Government employment?

MR. WOODS: No, he is not.

THE COURT: Since when?

MR. WOODS: Over two years, your Honor, -- approximately two years. He has retired, as I understand.

But here is what we are going to run into, your Honor. I am highly reluctant to go into any extended argument into the whys and wherefores of all this business as to this 90-day letter, for a couple of reasons.

[64] Number one, I'm not too well prepared on it; and, number

two, I don't think it is material.

But if we do get into it, here is what we will get into. We are going to get into trying to find where in the regulations of the Internal Revenue Code this recitation is made. We are going to have to find out why, and that being from a person someone other than Mr. Cashen, who certainly cannot be held to know, why the letter was issued? Under what circumstances always or with exceptions are such letters issued? Is it necessary to have waivers in order not to file such a letter? If a waiver is not filed by the taxpayer extending this period of time, then does the Revenue Department have to send out such a letter in order to protect itself? What is the statute of limitations relative to the Government proceeding for the assessment or determination of the civil liability? And we will find it's three years. And this letter apparently reads "for the taxable years 1944, '45, '6 and '7". So that we were more than two-thirds towards the end of the statute of limitations.

THE COURT: When does the statute of limitations run out on this case for the payment of taxes?

MR. WALTER: Your Honor, as I understand, --

THE COURT: Just a minute. I want Mr. Woods to answer that.

MR. WOODS: The tax determined for the year 1946, the [65] statute would have run on the 16th of March, 1950, eight days after this letter. But in any event, your Honor, we can see how far afield we are now discussing and are likely to go if we go off on this 90-day letter business.

THE COURT: Mr. Woods, the Court agrees with you that it is quite possible that we will have to deviate from what you consider the normal course that this hearing should take. However, after the first hearing, when the Court dismissed the petition and it went up to the Court of Appeals it was sent back here for the one express purpose, and that is for this Court to go into the matter fully.

MR. WOODS: Yes, sir, to make a determination --

THE COURT: Now, I think, in order to comply with the mandate of the Court of Appeals, I think that is exactly what this Court is bound to do.

MR. WOODS: For the purpose of the record only, then, your Honor, may the Government's objection to this line of interrogation stand as being two-fold?

THE COURT: I haven't ruled on that yet. I am just making a statement for the benefit of counsel as to the result of the previous hearing in this case.

You object, Mr. Woods, for what reasons?

MR. WOODS: Two-fold. Number one, it is not material from the standpoint of that this motion to suppress, filed by this Petitioner, [66] is detailed and in its detail it only discusses the illegal obtaining of these two books by the Government for these reasons:

That the Petitioner, in effect, was promised immunity from criminal prosecution, and that was the only reason he turned the books over. Had he not been so promised he would not have turned the books over to the Internal Revenue Agents.

It is important to note that he turned over these books on the 24th day of February, 1949, not after the 8th of March, 1950, when we are now talking about a 90-day letter having been issued. It is remote in point of time and it bears no relationship as far as the Government is concerned to the exact problem that confronts us, and that is: Why did Biggs turn these over? Not what the Government was thinking, but what was Biggs thinking? What was his motivation for turning over these records? and that is solely confined, from the pleadings, to his promise of immunity.

Secondarily, I think that this business of "corroborative" -- corroborative of what? He claims "corroborative". Corroborative of what? Certainly not the Petitioner's state of mind as to why he turned these over because he does not know anything about this thirteen or fourteen months prior to the time that he turned over these records.

THE COURT: Isn't this a situation where the defendant in a criminal case would have this identical defense?

This is a motion to suppress evidence, and all we have be-
[67] fore us is the petition which describes what it does describe and asks for a suppression of the evidence.

MR. WOODS: Right.

THE COURT: Now the question for this Court to decide is a narrow one: Is there evidence under Rule 41(e) of the Criminal Rules of Procedure to suppress evidence obtained by Government agents in the case to follow this motion?

That, it would seem to the Court, would be the proper procedure in the case.

MR. WOODS: May I make one other point, your Honor? I know I must be belaboring this something terrible.

Here is another way this thing strikes me. We are concerned here with Biggs. Why did Biggs do this? Why did he turn over these records?

I claim that we are not concerned with what the Government was doing or thinking.

This business of the 90-day letter, if he makes the claim that he claims, that sounds like an argument to the jury, saying "Well, look, here is what the Government did, members of the jury and your Honor, they issue a 90-day letter. They are not supposed to issue a 90-day letter when criminal prosecution is contemplated, but here is what they do, they do it anyhow. What kind of a Government agency have you got here that does such a thing?" That is what that line of inquiry is directed [68] towards. And the proper forum for it would be before a jury at the trial in the arguments of the case.

THE COURT: Well, why can't you, Mr. Walter, develop this defense in the criminal case, if there is no suppression?

MR. WALTER: Yes, I understand that, your Honor, but I think it is important to the very essence of our case. We have contended that there was a statement made to Dr. Biggs that only a civil action was contemplated and he was free to turn the books over with that impression, and his counsel was advised that he had to turn over the books since only a civil matter was contemplated.

Now, this matter that we have presented is to show that that

was confirmed by the action of the Department itself by issuing this letter which they could not issue as long as criminal prosecution was contemplated. And it is for that reason it is corroborative of what our contention is, that it was the understanding of the Department and the Department did so act in accordance with its own regulations, and it is for that reason we offer it at this point, your Honor.

And I am willing to brief the entire question and set forth all of the regulations as well as the statements --

THE COURT: I think that matter has, in all probability, been decided by our Court of Appeals in the case of Benes v. Canary (?). The District Attorney of Cleveland --

[69] MR. WALTER: I don't believe the 90-day letter was in issue in that case, your Honor.

THE COURT: Well, maybe it wasn't, but it is the kind of matter that the Court feels is one that may be taken advantage of at the trial in line with the language of our Court of Appeals, which reads, -- and it's the last paragraph in the case:

> "The judgment of the District Court is modified so as to make the dismissal of the action without prejudice to a later ruling at the proper time by the District Judge on the alleged incompetency of the evidence by reason of appellant's reliance upon the 'voluntary disclosure' policy of the Treasury."

Citing the Centracchio v. Garrity case with which no doubt you gentlemen are familiar.

MR. WALTER: Yes, your Honor.

The difference between the voluntary disclosure policy and the question we are raising is simply this: That the voluntary disclosure policy was the one upon which taxpayers relied in releasing records.

What we are contending is a matter of evidence; that we have a right to corroborate the arrangement which was made between the Collector of Internal Revenue, Giles Kavanagh, and the Petitioner, by things that the Department did after the arrangement was made, the way it [70] conducted itself, and the fact that the 90-day letter was issued and could only be issued after determination was made that no criminal action was to be processed.

And that is our contention on the point and we believe it is pertinent to this issue to corroborate the statements we are making in our contention to show that the Department itself went along on that basis.

THE COURT: Is the volume of regulations you have there the same as appears in the bound volume of the code that the judges have?

MR. WALTER: It should be in the Code of Federal Regulations, and that is available to the Courts. It is Title 26, Part 601, Code of Federal Regulations, as re-issued in 20 Federal Register 127.

THE COURT: We don't have the Federal Register.

MR. WALTER: I'll have to make that available to you, your Honor.

I will cite you this other number, Section 601.105(g).

THE COURT: All right, we will now adjourn until two o'clock this afternoon.

MR. WALTER: Thank you, your Honor.

(Noon recess.)

[71]

Detroit, Michigan
Tuesday, October 11, 1955
2 o'clock P. M.

- - -

(The Court convened pursuant to adjournment.)

- - -

(Parties present the same as before.)

- - -

THE COURT: I believe the last question was about receiving a letter, is that right, Mr. Walter?

MR. WALTER: That's right, your Honor. We were talking about that this morning, just before we recessed for lunch.

THE COURT: I don't remember the exact language of the question, but if that is all that there was, if the witness has personal knowledge of that fact or if he received the letter, he may answer that.

RAY CASHEN, naving been previously duly sworn, resumed the stand and testified further as follows:

REDIRECT EXAMINATION (Cont'd.)

BY MR. WALTER:

Q Mr. Cashen, you have heard the ruling of the Court and you can now answer the previous question as to whether or not, from your personal knowledge, a letter was received from the Internal Revenue Division -- Department known as a 90-day letter which notified the Petitioner [72] that he had 90 days in which to file an appeal to the Tax Court?

A There was such a letter received. Dr. Biggs turned the letter over to me.

Q What was the date of that letter; do you know?

A That, I don't know.

Q Would you refresh your recollection? Was that March 8, 1950?

A If you say that is the date; why -- I don't know.

MR. WOODS: Let's see the letter.

THE COURT. What was that?

MR. WOODS: I was asking, the best evidence on that would be the letter.

MR. WALTER: I think the Court has the letter.

(The "90-day letter" referred to above and the notice that the taxpayer had 90 days to appeal was marked for identification Petitioner's Exhibit 5 and 5A by the reporter.)

Q (By Mr. Walter) Handing you, Mr. Cashen, what has been marked for identification Petitioner's Exhibit 5 and Petitioner's Exhibit 5A, would you please identify those for the record?

A These are a part of the 90-day letter that Dr. Biggs turned over to me, that he received from George Neal's office.

Q What is the date of that letter?

A March 8, 1950.

MR. WALTER: May we submit that into evidence at this time, your Honor?

[73] MR. WOODS: What is missing, if your recall?

A The figures. That is, in effect, a notice.

MR. WOODS: Are you offering that into evidence at this time?

MR. WALTER: Yes.

MR. WOODS: We'll object to it at this time solely to be consistent with our earlier objection that this line of testimony is immaterial.

THE COURT: The Court feels that it is too early in the proceedings for the Court to make a negative ruling. In view of that fact, the Court will receive it for whatever evaluation, purpose or meaning it may have, in the light of all of the testimony in the case.

MR. WOODS: We understand.

MR. WALTER: That's all.

RECROSS EXAMINATION

BY MR. WOODS:

Q This 90-day letter which is Petitioner's Exhibit 5, that was received immediately after the posting date of March 8th, 1950; is that correct?

A I believe that is correct; yes.

Q Tell us, Mr. Cashen, did you not, as then attorney for the Petitioner Dr. Biggs, and Dr. Biggs himself, know prior to the issuance of that 90-day letter that a criminal case was contemplated?

[74] A I can answer that in this way: Jim McFarlane, who was working --

Q Who is Mr. McFarlane?

A The gentleman sitting right behind Mr. Kaess.

Q Was he the Special Agent of the Intelligence Unit?

A He was the Special Agent of the Intelligence Unit after Mr. Sullivan had withdrawn and left the Unit.

Q In other words, Mr. McFarlane was a member of the Criminal

Fraud Section of the Internal Revenue Department?

A That's right. He was then in charge, as I understand, of that case.

Q What about Mr. McFarlane?

A I don't know of the occasion that brought us together, but Mr. McFarlane talked to me. He had completed his report and that he was making a recommendation that criminal proceedings would be brought against the doctor.

Q You knew that?

A Yes.

Q Dr. Biggs knew that?

A Well, I told that to Dr. Biggs.

Q Well, that's what I mean, he knew it through you, his authorized counsel?

A Yes.

Q That was prior to the receipt of the 90-day letter?

A That's right.

[75] Q Ordinarily, is it not true, Mr. Cashen, that a waiver is asked of the taxpayer through his counsel, a signed waiver, in order to do away with the filing of the 90-day letter by the Revenue Department?

MR. WALTER: Object. Is there such a regulation?

THE COURT: I can't hear you, counsel.

MR. WALTER: I said I object on the basis of whether or not there was such a regulation.

I wonder if he might cite it.

MR. WOODS: Well, let me re-phrase the question.

Q Section 275 of the Internal Revenue Code, Title 76 -- I will re-phrase the question.

MR. WALTER: All right.

Q (By Mr. Woods) In representing Dr. Biggs, had you, prior to the filing of the 90-day letter, been asked to have your client, the doctor, sign a waiver of the filing of this 90-day letter of the notice of assessment?

A Somebody called me up, but that is as far as it went. They asked me --

THE COURT: Just a minute. Who would this "somebody" be?

A I don't know whether he would be out of George Neal's office in some capacity. He called me up and --

Q (By Mr. Woods) By that I mean it was somebody in the Treasury Department?

[76] A That's right.

Q All right.

A I told him I would take it up with the doctor, and that is the last I ever heard of him.

Q In any event, representing the doctor at that time, did you have your client sign a waiver?

MR. WALTER: For what years?

MR. WOODS: For the years '46 and '7.

A There was never one presented to us. There was never

anything done further about it, except this telephone call. I don't know who it was. They called me up and said they were with the Revenue Department and wanted to know if I would sign a waiver and to extend, I think it was the '44 and '45. I said I would take it up with the doctor and that is the last I have ever heard of it.

Q By the way, you had Dr. Biggs' power of attorney at that time to represent him in the matter then pending before the Treasury Department?

A That's right.

Q So you would have been the one who would be contacted, isn't that right?

A That's right.

Q Do you recall, at a date subsequent to the receipt of the 90-day letter, having filed a memorandum brief with the Penal Division of the Chief Counsel's Office of the Bureau of Internal Revenue?

[77] MR. WALTER: Prior or after?

MR. WOODS: I said "subsequent".

Q (By Mr. Woods, continuing) Subsequent to the receipt of that letter, that 90-day letter?

A We received a letter in March and I believe we filed our brief sometime the following summer.

I might say this. We wrote to the Internal Revenue Department and requested the usual privileges to go in and examine the agents report, andsoforth, and that was the first formal notice that we had that this was a criminal case. They wrote us a letter denying us that privilege

because this was a criminal case.

Q You say "notice". You mean --

A Formal notice, I say.

Q But you did, however, have notice from the Criminal Fraud --

A McFarlane told me from time to time that he was representing criminal and he told me finally that he had written the report and had recommended in it. That was in February.

Q Of course, you considered yourself on notice with that, did you not? Yes, or no?

A Sure.

Q I show you Government's proposed Exhibit No. 6 and ask you if you can identify that, Mr. Cashen? (Handing Exhibit to the witness.) Do you recognize that?

A We made this motion --

[78] Q Who is "we"?

A Mr. Platt and I.

Q You and Mr. Platt represented Dr. Biggs?

A Yes, and we made this motion before --

Q What is that document?

A Well, I don't know just what you would call it, it is a form of a motion.

Q A memorandum?

A Memorandum of a complaint. I don't know legally just what you would call it. I can't think of the gentleman's name who was attorney here at that time -- Shelton, Jim Shelton and Bob Furtow(?), who were

head of the Penal Division, the Legal Department.

Q Of the Bureau of Internal Revenue?

A Of Special Intelligence. They acted, as I understand it, as legal counsel for the Special Intelligence. And when we got the letter --

Q The 90-day letter, Exhibit No. 5?

A No, the letter we wrote to George Neal requesting the right to go over the Revenue Agent's report. When we got the letter back from George Neal, it was referred to the Attorney's office of the Penal Division, Shelton's office. So we then prepared this petition, for memorandum or complaint, or whatever you choose to call it, and we presented it and we went over and argued our positions and the Government refused to answer us.

[79] Q This is a copy rather than an original, is it not?

A I would assume so because there are no signatures on it.

Q All right, do you know what happened with the original?

A I believe it was filed with Shelton's office.

MR. WOODS: We move for admission into evidence, your Honor, of Government's Exhibit No. 6.

MR. WALTER: There is no objection on the part of the respondent Petitioner.

THE COURT: It may be received.

Will you inform the court what that is so I can make a note here?

MR. WOODS: Yes, sir, I will.

It is entitled -- it has an address on the letter -- "Penal

Division, Chief Counsel's Office, Bureau of Internal Revenue, Detroit, Michigan.

"In re Dr. Raymond A. Biggs."

It is an eleven page document, your Honor, signed by Mr. Cashen, this witness, and Joseph S. Platt.

May I proceed?

THE COURT: Yes.

Q (By Mr. Woods) Is it a fair statement, Mr. Cashen, that this document as well, which apparently bears the date of May 11th, 1950, also recites that counsel, yourself, at the time, and the taxpayer knew and had been made previously aware that criminal prosecution was contemplated?

[80] A I have not read this all through, but I believe that that is true.

Let us not kid ourselves. When Mr. McFarlane told me he was going ahead with his recommendation, I believed him.

Q And that was prior to the filing of any 90-day letter that you received?

A Pardon?

Q And that was prior?

A That was in February, 1950. Yes, he told me that the case went ahead from there.

Q In regard to the years '46 and '47, Mr. Cashen, do you have a recollection as to whether or not the waivers requested by the Revenue Department were sent to you or to your client?

A I don't believe there were ever any waivers sent.

Q Formally through the mail?

A Through the mail. Now, I do recall of getting a telephone call from someone asking me if the doctor would sign waivers, and I told them I would let him know, and I heard nothing further of it after that.

Q You didn't let the Revenue Department know either, did you?

A No, I don't think I was supposed to.

MR. WOODS: That's all.

[81] REDIRECT EXAMINATION

BY MR. WALTER:

Q You say you didn't think you were supposed to?

A No, I think the way the conversation was left I think he was to contact me and to call me back. I didn't even know he was with the Revenue Department, but I do remember a telephone call, as the stuff is coming back to me now, of somebody calling me in regards to waivers.

Q The usual practice was for waivers to be sent to the attorney of record and he could then execute them or have his client execute them or not execute them, is that right?

MR. WOODS: I object. I think it is very leading and I doubt if this witness can testify to that.

THE COURT: Objection sustained.

(Two letters were marked for identification Petitioner's Exhibits 7 and 8 by the reporter.)

Q (By Mr. Walter) Mr. Cashen, you have previously testified that a petition was filed with the Penal Division, which has been marked for the purpose of this hearing as Government's Exhibit 6, is that right?

A That's right.

Q Now, prior to that time, had you written a letter to the Department requesting the privilege of seeing the computations of the agents in the computation of the 90-day letter?

MR. WOODS: I don't see how this is material, your Honor? Is this not going even somewhere beyond the --

[82]

MR. WALTER: Well, your Honor, in presenting Exhibit 6, testimony was given by this witness in cross-examination that he had been fully notified by the Department by letter after the 90-day letter was received that criminal prosecution was contemplated.

I would like to place before your Honor, so you will have all of the information, a copy of that letter so that it is available to you in accordance with the testimony of this witness on cross-examination.

THE COURT: He may answer.

Q (By Mr. Walter) Handing you what has been marked as Petitioner's Exhibit 7 and Petitioner's Exhibit 8, will you please identify those for the record? (Handing documents to the witness.)

A Exhibit No. 7 is a letter from George Neal's office in which they say that my request for a copy of the Revenue Agent's report has been turned over to J. H. Shelton, the local representative of the Chicago Regional Office of the General Counsel's Office, Penal Division, for consideration. That was sent to me on May 1, 1950.

On May 9, 1950 I received Petitioner's Exhibit 8, which is the etter from Joseph Struett's office in which Mr. Shelton was working, and this is the letter which tells us I cannot have the right or the usual privilege of getting the copy of the Revenue Agent's report because, as it

[83] says here,

"Accordingly, the request contained in your letter cannot be granted at this time. However, when the merits of the criminal case have been disposed of, this office will be happy to advise you as to which department of the Bureau will have jurisdiction of the civil liability. At that time you may wish to renew your request to that department."

MR. WALTER: That's all, Mr. Cashen.

May we have those letters introduced at this time, please, Exhibits 7 and 8?

MR. WOODS: We just register the same objection in the whole tenor of this inquiry, your Honor.

THE COURT: Well, wait a minute, he testified about these two exhibits, this witness.

MR. WALTER: That's right.

THE COURT: I don't know whether opposing counsel has seen the[illegible]r not.

MR. WOODS: I have no objection to the fact that photostats are submitted, or to the authenticity, as such, of the instrument, your Honor. My objection is directed to their being a part of the same line of inquiry as was my objection.

THE COURT: What are those records? I don't propose to sit here and start admitting loads of paper that may or may not have something to do with this matter. I would like to see them.

[84] MR. WOODS: On my objection basis, I fail to see how they

are pertinent.

(Short intermission while Court examines exhibits.)

THE COURT: Well, they may be received for whatever they may or may not add to the information for the benefit of the Court in arriving at a decision.

MR. WALTER. That's all from this witness, your Honor.

MR. WOODS: One minute.

RECROSS EXAMINATION

BY MR. WOODS:

Q Mr. Cashen, do you remember some time approximately in June of 1950 of having had a conference, yourself and Mr. Platt, with Mr. Shelton, Special Attorney of the Detroit District Office and Robert Furtow, also a Special Attorney?

A I know we were in there a couple of times. I don't know the occasion or the dates

Q Do you recall at this conference at which you were present with Mr. Platt who was also, as I understand, representing Dr. Biggs at the time, Mr. Shelton stating to you that the waivers had been sent to the taxpayers rather than to you, even though you had been on record as the attorney? You do not recall that?

A No, I do not recall that. If it was said, I don't remember.

[85] MR. WOODS: No further questions.

MR. WALTER: No further questions of this witness.

THE COURT: You may step down.

[85] (Witness excused.)

MR. WALTER: Mr. Snider.

NORMAN M. SNIDER, was called as a witness on behalf of the Petitioner a[illegible], having been first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. WALTER:

Q Mr. Snider, will you please state your name and address for the Court?

A Norman M. Snider, 17765 Manderson Road, Detroit.

Q And you are an Attorney at Law, admitted to practice in the State of Michigan and before this Court?

A I am.

Q Did you have occasion to represent the Petitioner Raymond Biggs?

A I did.

Q When did that representation begin?

A It was the latter part of 1948.

Q And what was that representation in regard to?

A In regard to a tax matter which was pending before the Internal Revenue Department.

Q Did you have cause to prepare an affidavit as the result of that [86] representation?

A I did.

Q Handing you what has been marked for identification, a

photostat copy of Petitioner's Exhibit 2; will you please identify that for the record? (Handing exhibit to the witness.)

A This is the affidavit which I signed on June 5, 1952.

MR. WOODS: No objection.

MR. WALTER: May this be received in evidence, your Honor?

THE COURT: It may be.

Q (By Mr. Walter) Mr. Snider, will you tell the Court the circumstances under which that affidavit was executed?

A A few days prior to June 5, 1952, Mr. Raymond Cashen, who was substituted as counsel for myself for Dr. Biggs, came to my offices in the National Bank Building and asked me if I would sign an affidavit relating in substance what transpired between myself and the late Giles Kavanagh, the Collector of Internal Revenue for this area. I read the affidavit over and I told him that I would not sign the affidavit until I had had an opportunity to reminisce and to mull over the facts as best as I could recall them, and that I would give him an answer within a day or two.

Q Was anything said by you about conferring with Giles Kavanagh prior to executing the affidavit?

[87] MR. WOODS: Let's not lead him, Mr. Walter. Let's ask him what conversations were had and with whom?

THE COURT: What was the question?

MR. WALTER: "Was any conversation" -- I'll withdraw the question, if it was objectionable.

Q (By Mr. Walter) Was there any conversation between you and

Giles Kavanagh relative to the preparation of this affidavit prior to your signing it?

A Well, I would like to rephrase it in my own way, if you don't mind.

Q All right.

A I deliberated quite a bit before I took any action on the affidavit and inasmuch as this matter was a matter between Mr. Kavanagh and myself, -- that is, the content of this affidavit, I felt, in fairness to myself and in fairness to the late Giles Kavanagh, that I should contact him and go over this affidavit with him and I did just that.

Q Did you take a copy of the proposed affidavit with you when you --

MR. WOODS: Just a minute. You are leading him, Mr. Walter. Ask him what he did.

Q (By Mr. Walter) What did you do?

A I called the Collector of the Internal Revenue, Mr. Kavanagh, and made an appointment with him and I met him at the appointed time at his offices in this building.

[88] Q What occurred?

A We went over the general facts and particularly as set forth in this proposed affidavit. Mr. Kavanagh was the one who had possession of the affidavit on his desk at the time and he made certain corrections and I said to him: "Giles, I want you to feel that any corrections you make I will abide by." And he did make certain corrections and we discussed the corrections as we went along and finally this is the affidavit

that I executed.

Q What corrections did Mr. Kavanagh make in the originally proposed affidavit, if any?

MR. WOODS: Wait a minute. What originally proposed affidavit? Isn't that it?

Q (By Mr. Walter) Have you a copy of the draft of the affidavit that you --

A If you will be so kind as to hand me my file which is on the chair I was occupying in the rear, I can best assist you in that fashion. (Receiving a file from Mr. Walter.)

(The witness handed some documents to Mr. Walter.)

(The original and photostat copy of the original draft of Norman Snider's affidavit were marked for identification as Petitioner's Exhibit 9 by the reporter.)

Q (By Mr. Walter) Handing you for the purpose of identification what has been marked as Petitioner's Exhibit 9, will you please identify [89] that for the record?

A What I stated just a moment ago, with reference to the original affidavit that was handed to me by Mr. Raymond Cashen, is now marked Petitioner's Exhibit No. 9, and on this Exhibit appears the ink corrections which Mr. Kavanagh made in my presence.

Q And is that the same as this photostat copy?

A I had this photostat copy made during the noon hour after I witnessed the presentation of exhibits before this court so that I would be able to retain the original if in any event the original should get lost. Up

to that point I had not made a photostat of it.

(Mr. Walter hands Exhibit 9 to Mr. Woods.)

MR. WOODS: I take it you have not seen this exhibit before, Mr. Snider, and I will show you Petitioner's Exhibit No. 2 and ask you to look at that, and the proposed Exhibit No. 9, which apparently was the original, and ask you whether or not No. 2 which you now hold is the final draft and affidavit which you signed, as made up from Petitioner's Exhibit No 9?

A That is correct, sir.

MR. WOODS. That is correct? All right.

Now I will ask you to refer to the second page of the initial draft, Petitioner's proposed Exhibit No. 9, and you will notice certain ink erasures and certain ink additions thereto; is that correct?

A That is correct.

[90] MR. WOODS: Reading in the middle of the next to the last paragraph, and I will quote it before any ink erasures were made:

". . . . In any event, Deponent definitely understood" -- "Deponent" being yourself, isn't that correct?

A Yes, sir, that is correct.

MR. WOODS: (Continuing reading)

". . . . Deponent definitely understood that Dr Biggs was being given the absolute assurance against prosecution, which he insisted upon having before he would surrender the books."

MR. WOODS: Now I will ask you to refer to Exhibit No. 2 and ask you if there is any significance to the fact why the word "absolute"

assurance against prosecution was changed to mere "assurance"?

A As I recall the conversation with Mr. Kavanagh at the time we discussed it, he thought that the language was superfluous and was too strong.

MR. WOODS: In other words, that he did not give you any assurance that there was going to be no criminal prosecution; is that correct?

A It uses the term "assurance", if you will please read it.

MR. WOODS: I read it.

A The term "assurance" was not eliminated. The term "absolute" was. And Mr. Kavanagh felt at that time that the word "absolute" [91] was superfluous and was not necessary.

MR. WOODS: Did he consider it superfluous because it was not the assurance that had been given by him?

A Do you want me to be frank about it?

MR. WOODS: I want you to be truthful about it. That's why you are on the stand.

A Truthfully, the assurance was given to me on behalf of Dr. Biggs.

MR. WOODS: Yes, but not the absolute assurance that there would be no criminal prosecution.

A The term "absolute", I have already explained it to you, that Mr. Kavanagh felt that it was superfluous.

MR. WOODS: Would you say that the assurance he had given was something less than absolute?

A I don't want to be too technical about it. You can put your own interpretation on it. I have given it to you as I received it and as it was discussed at the time.

MR. WOODS: In other words, you are telling us that the only reason it was stricken, apparently, was because it was "superfluous", in Mr. Kavanagh's words?

A That's the way he termed it at the time.

MR. WOODS: Why was "which he insisted upon having" stricken from the final draft?

A If you will show it to me as it connects up, --

MR. WOODS: Yes, sir. It's in the same sentence.

[92] A I just can't pick it from a distance. What portion?

MR. WOODS: (Indicating on a document.)

A The same discussion followed when this was eliminated, when he termed it that this was superfluous.

MR. WOODS: Wait a minute. You're saying "which he insisted upon having" was not the actual fact? In other words, that Dr. Biggs did not insist upon having that? Or are you stating that that was eliminated because, once again, that was superfluous?

A I think the easiest way to explain it, Mr. Woods, is not in a technical breakdown, as you are wanting me to put it to you, but I will read the sentence with the original and without the original, and I believe it means the same thing also. Do you mind if I do that?

MR. WOODS: Well, almost.

A You mind if I read it, if you will please, so the Court will

follow it?

MR. WOODS: Read the initial one first.

A That is correct. I will.

". . . In any event, Deponent definitely understood that Dr. Biggs was being given the absolute assurance against prosecution, which he insisted upon having before he would surrender the books."

That is the original. Now I give you the delineation.

MR. WOODS: The corrected one.

[93] A The corrected one.

". . . In any event, Deponent definitely understood that Dr. Biggs was being given the assurance against prosecution, before he would surrender the books."

MR. WOODS: Is it not true that one is something less than the other, in your interpretation?

MR. WALTER: Object, your Honor. That calls for a conclusion for the Court to decide.

MR. WOODS: I agree. Excuse me.

THE COURT: Well, it is on the border line, whether it is a conclusion.

If you will take a rule this long and one about this long (demonstrating with hands), it wouldn't necessarily be a conclusion.

MR. WALTER: That's right. But lawyer language may change and different people may have a different view upon it, and I think the Court can decide whether there is a difference in meaning.

THE COURT: I think Mr. Snider knows how to handle him-

self pretty well here in giving us an explanation in answer to the questions, and the rest will be up to the Court anyway, we all know.

MR. WOODS: Was the second one something less?

A I would rather leave it as the Judge just intimated, that the Court is the final judge as to whether or not the delineation altered the [94] intention or didn't.

MR. WOODS: Well, in putting it in the way you previously expressed it, in any event the initial one carried superfluous inclusions which the second one does not carry, is that correct?

A That is right, that is correct, Mr. Woods.

MR. WOODS: All right, you may go ahead, Mr. Walter.

MR. WALTER: May we now introduce the photostat copy of --

MR. WOODS: No objection.

THE COURT: It may be received.

MR. WALTER: I would like to introduce this substitute for the original.

THE COURT: Well, I understood from what counsel has been talking about and the witness testifying, that there is some difference there, and I understood what the difference is.

MR. WALTER: All right, I would like to introduce the photostat for that.

THE COURT: All right.

Q (By Mr. Walter) Now, can you tell this Court who prepared the original affidavit that was submitted to you, which is marked as

Petitioner's Exhibit 9?

A From what Mr. Cashen told me, that he --

MR. WOODS: Do you know who prepared it?

[95] A Mr. Cashen submitted it to me and I presume that that is the nearest and best way that I can answer it.

Q (By Mr. Walter) Now, did he have any conversations with you prior to the preparation of the affidavit?

A No, he did not.

Q Now, will you tell the Court whether or not the affidavit reflects what occurred?

MR. WOODS: Which affidavit?

MR. WALTER: Affidavit which is in the Exhibit 2.

Q (By Mr. Walter, continuing) Does it reflect what occurred in the period of January and February, 1949, in your relationships with Mr. Kavanagh?

A The sum and substance, I would say yes.

Q Now, would you tell the Court, as you can best recollect, what occurred in your relationship with regard to the Biggs case in January and February of 1949?

A In the early stages of my retention as counsel for Dr. Biggs, I took the matter up with Mr. Kavanagh and I discussed the facts as given to me by the doctor with Mr. Kavanagh.

As a matter of fact, I wanted to be sure in my own mind that Mr. Kavanagh would get the facts as straight as they could be given to him. --

MR. WOODS: Excuse me one moment, please.

Your Honor, I would suggest that this testimony of this witness go in in question and answer form. I mean, right now, he talks [96] about, for instance, early in his retention by the doctor. "Early" could have been in December and it could have been after February 24, 1949, when these records were turned over. The best way to pin-point these things is as to time and place, where was it? Who was there? And what was said? If on a question-and-answer basis.

THE COURT: I think counsel is entitled to his request being granted.

Q (By Mr. Walter) Will you state when you were retained by Dr. Biggs?

A The latter part of 1948.

Q When was your first contact with Collector Kavanagh on this matter?

A I believe that my retention was so close to the Christmas and New Year season, that the first opportunity that I availed myself of to contact Mr. Kavanagh was right after the New Year.

Q Where did that meeting take place?

A I went over to see him in this building.

Q And what occurred at that conference?

A I gave him the highlights of the case as it was given to me by the doctor, and in the course of our conversation I said "Mr. Kavanagh, I think it would be much better and we would have a better understanding if I was to have you meet the doctor and we would arrange a luncheon or

have him over here and you would get the facts first-hand."

[97] Q What did he say?

A He said I should keep in touch with him within the next day or two and he would see what his agenda was and he would have no objection to meeting the doctor.

Q Did he contact you or did you contact him after that?

A I contacted him and I arranged for a day and date. The exact date I don't recall as of this moment.

Q But a meeting did result on that arrangement?

A We had more than one meeting, for your information.

Q And in fact it was in January of 1949?

A It was.

Q And who was present at that meeting?

A As near as I can recall, Mr. Kavanagh, the doctor and myself.

Q And what was discussed in regard to this particular matter?

THE COURT: Will you fix the time, more or less?

MR. WALTER: In January.

Q (By Mr. Walter) What would you say, Mr. Snider?

A During the month of January, 1949.

Q During the month of January, 1949?

A That is correct.

Q And what was discussed in those meetings in regard to this particular matter?

A Amongst various things, it would be the topics of the day, what experience the doctor has had at the hospital. He was more or less

interested in it. He was of a sickly nature, Mr. Kavanagh himself, and [98] then we discussed his tax situation. Mr. Kavanagh in my presence and in the presence of the doctor said he would do all in his power to assist him to have this tax matter adjusted.

Q Now, what did he say in regard to having this tax matter adjusted?

A As far as he was concerned, Mr. Kavanagh, that in his opinion of the case, as we submitted it to him, that there would be no criminal prosecution.

MR. WOODS: When?

A In January. That was after we had had these talks with him on two or three occasions during the month of January of 1949.

Q (By Mr. Walter) Now, did there come a time in January or February, 1949, when Agents Sullivan and Krieger had conferences with you?

A There was.

Q And when did those conferences first occur?

A As near as I recall, Mr. Krieger came over to see me some time in January of 1949, after I had been retained, and gave me a list of questions that he would like to have the doctor answer pertaining to his worldly possessions, and I told Mr. Krieger at the time that I would do all in my power. I wanted him to know that I would cooperate with him one hundred per cent in obtaining any and all information that would be made available to me.

[99] Q Now, at what time did Mr. Sullivan come into the picture?

A It is very difficult for me at this stage to pin-point the date, but while I was present in court all the forenoon the date has been established as February 24, 1949, when the alleged books were turned over to the Government, I would say it was about two weeks prior to that time that Mr. Krieger presented himself to Mr. Sullivan and said that Mr. Sullivan was working in the case with him. It might be two or three weeks at the outside.

Q Sometime in the period prior to February 24th, a matter of weeks, Mr. Sullivan was brought into the case by Mr. Krieger and introduced by him, isn't that correct?

A That is correct.

Q Now, was there any discussion with either of these agents as to whether or not there were more records of Dr. Biggs?

A I would say that from the moment Mr. Sullivan came into the case and also on maybe one or two occasions prior to that, but I believe more pointedly when Mr. Sullivan came into the case, insistence was made that they were not receiving the proper cooperation from the doctor in order to arrive at the full facts in the case for a determination of the deficiency, if any.

Q Now, at that time, what deficiency were they talking about, if any, civil or criminal?

A Civil deficiency.

MR. WOODS: Who was?

[100] A Both of them.

MR. WOODS: Both of who?

A Mr. Krieger and Mr. Sullivan.

Q (By Mr. Walter) Now, was there a time when a demand was made for more records by either of these agents?

A Both of them insisted. As a rule, when they would visit me they would be together and they would insist that the doctor is holding out on information, records, or the likes, from them so that they could go on with their investigation and bring it to a head.

Q Did you have any discussion with Mr. Kavanagh about that situation after these requests had been made?

A I did. I had conversation with him and he felt just like I did, that it would be to our advantage to furnish just as much information as we can to assist the Revenue Department in getting the information as speedily and as readily as they could.

Q Did you discuss the matter with Dr. Biggs?

A I did. I had him come down to the office once, twice or maybe three different occasions. And as Mr. Cashen testified, it would be on the latter end of the day, the latter part of the day because of his occupation. He could not get away any sooner. I did not mind staying down, and I kept telling the doctor. I said, "Doc, you are just going to have to make up your mind that if there is any information that you have at your [101] command to furnish the Department. And with the relationship I have now established between you and Mr. Kavanagh, it would be to your advantage to furnish this information to determine the civil liability."

Q What did Dr. Biggs then do, if anything?

A Eventually, Dr. Biggs, about the second or third time he came

down to see me about this specific matter --

Q Is this sometime in early February?

A That is correct. It would be more towards -- not the early part of February, but it would be more towards the middle of February and later than that. I would say as close to the 24th as you can make it.

Q I understand.

A He said, "Snider, I do have two books."

Q Did he identify the books?

A He did not identify the books. And, for the moment, I did not know what kind of books he had reference to. He said he had two books for the years '46 and '47.

Q And what did he say about those books?

A At that time he said "I want you to find out, before I turn these books over," --

MR. WOODS: What is the time on this, Mr. Snider?

A I would say this was about three days maybe before the 24th of February.

MR. WOODS: February 24th, of '49?

[102] A That is correct, three or four days prior to that.

MR. WOODS: Thank you.

A (Continuing) "I want you to find out for positive, before I turn over these books, that by turning these books over it will not get me into any trouble." He used the term "trouble".

Q (By Mr. Walter) What did you say to him?

A I told him that this was a very serious question, a very serious

question. I said, "When you say 'trouble', do you mean that criminal prosecution?" And he said, "I do mean criminal prosecution." And I said, "Well, there is only one thing I can do, Doc, on this. I am not going to take the responsibility of either withholding or not withholding these records. I am going to get in touch with Mr. Kavanagh and take the matter up with him and present it to him."

Q Did you do that?

A I did.

Q And did Dr. Biggs know you were going to do that?

A He insisted that I do not take the responsibility on my own shoulders and I so informed him, whether he told me that or not, that I wouldn't.

Q Now, did you see Mr. Kavanagh or did you talk to him?

A I called him on the phone. I did not see him in person.

Q But you did talk with Mr. Kavanagh on the phone?

A I did.

Q And what was your conversation?

[103] A He took the same attitude that I did. He did not want to assume the responsibility of giving me an answer over the phone. And he stated he would inquire about the books and would call me back.

Q Did he call you back?

A He did. He called me back later that day. I must have contacted him in the forenoon and he called me in the mid-afternoon that same day

Q What did he say to you at that time?

A At that time he said that he had contacted whomsoever he did. He didn't mention any names to me. And he said, "Norm, you are now in a position where you are forced to have those books turned over, having knowledge of it, but as far as criminal prosecution is concerned, don't worry about that."

Q Did he say anything to you about how the books were to be used?

A I don't believe he did.

Q Was there any conversation by you as to the purpose of submitting the books?

A I don't believe we went into that phase of it. I was satisfied with the answer that he gave me, that as far as he was concerned, after talking to whomsoever he consulted with, that there would be no criminal prosecution.

Q Now, did he say anything to you about your status with the Department?

A He did. He said if I did not surrender those books or have [104] my client do so, that I would have to either withdraw from the case, or, if I didn't, and remained in the case and did not have the books turned over, I would lose my Treasury card with the Department.

Q Now, what happened after that conversation with Mr. Kavanagh?

A I contacted, I don't recall whether it was Krieger or Sullivan for the moment, because I found out later that Mr. Krieger was in one department and Mr. Sullivan was in the other. I don't remember which one I was able to contact, but one of the two, and I contacted whichever

one of the two that it was and I said if they would come to my office at a certain given hour I believe I had some information that would help them to determine the tax liability, or some language to that effect.

Q Now, did you have any conversation with Dr. Biggs prior to the time you had the meeting you now testified about with the Agents?

A I did. I called the doctor and I told him I was having the Agents come into the office and he should bring with him the two books that he mentioned to me he had in his possession.

Q Did you say anything to him about your conversation with Mr. Kavanagh?

A I did.

Q What did you say to him?

A I told him that Mr. Kavanagh said there would be no harm in giving those books. I said "He even wanted me to convey to you, Doc, [105] that there is nothing to worry about, that there would be no criminal prosecution."

Q Then did Dr. Biggs come to your office and bring the books with him

A He did.

Q Who was present at that meeting?

A Mr. Sol Krieger and Mr. Sullivan.

MR. WOODS: Byron Krieger.

Q (By Mr. Walter) Now, on what date did that occur?

A Pardon me. I have a frfend by the name of Sol Krieger and I sort of slipped.

Q On what date did that occur?

A I would not have recalled the date except I heard it repeated here in open court. It is fixed at the 24th of February, and I believe it is about that time, 1949.

Q And the two doctor's hand-books, the two blue-covered hand-books for '46 and '47 were they turned over at that time to the Agents?

A It was.

Q The two of them were?

A That is correct.

Q Now, Exhibit 2, which is the final affidavit which was executed by yourself, as I understand your testimony, this was prepared by Attorney Cashen without prior consultation with you and was then submitted to you, is that your testimony?

[106] A As I recall it, I think he told me at the time that he had gone over the matter very carefully with Dr. Biggs and that he assisted Mr. Cashen and whoever else was interested in preparing that affidavit in setting up the facts as they were set up there.

Q And you had no consultation either with Dr. Biggs or Mr. Cashen in regard to the contents of the affidavit before it was submitted to you?

A No.

Q But the facts in the affidavit were the same as what actually occurred back in the period of January and February of 1949?

A I would say that this is the sum and substance of it There was a lot of matter leading up to all of this.

Q Which you testified to today?

A That is correct.

Q Which has expanded the contents of the affidavit?

A That is correct.

MR. WALTER: That's all, Mr. Snider.

CROSS EXAMINATION

BY MR. WOODS:

Q So I can get these fellows straight, Mr. Byron Krieger, Agent Krieger, and Agent Sullivan were in this case in the early stages, is that correct, Mr. Snider?

A That is correct.

Q Now, which one did you understand was from which Department? I get them mixed up myself sometimes.

[107] A As I stated at the outset, Mr. Krieger was the first to approach me.

Q He was the Revenue Agent?

A That is correct, -- I didn't know precisely what Department he was from except that he came in as an Agent in a tax matter.

Q Had you known him before?

A I had not.

Q What about Mr. Sullivan? Mr. Sullivan, of necessity, was from the Special Agents, Intelligence Division.

A I didn't ascertain or learn about that fact until sometime after Mr. Sullivan came to my offices.

Q You knew that before the 24th of February, 19 --

A Well, yes, a little prior to that I did know.

Q How long have you been practicing law, Mr. Snider?

A Thirty-four years.

Q You have a Treasury green card, have you not?

A I do.

Q How long have you had that?

A Oh, twenty or twenty-five years.

Q Well, in that twenty or twenty-five years you have had some practice before the Revenue Department, haven't you?

A Some.

Q What, "some"?

A I have had some practice. Now just how far do you want me [108] to go?

Q It is not a "sometime" or "occasional" thing, as opposed to as much as the ordinary part of your practice, as anything else?

A I will say I am not a specialist in tax matters, as such, where I have cases of referen e to me by other counsel. I am a general practitioner and I take the practice as it comes.

Q Which, over a period of twenty-five years, has included numerous types cases, is that correct?

A Some.

Q Have you ever handled civil penalty cases, civil assessment cases before?

A I have had some.

Q Have you ever had criminal tax cases?

A No. That is, none that have come to trial.

Q Then I'm asking you if you have ever handled any criminal tax cases?

A No.

Q Have you ever handled clients who have been under criminal investigation, criminal fraud investigation over the twenty-five years?

A I have had some that were eventually, but I didn't handle the criminal phase of it.

Q I asked you whether you handled any over the past twenty-five years?

A No, I have not.

[109] Q In other words, all of these clients who have had tax difficulties have all been civil?

A That is correct.

Q Well, in any event, in your thirty-four years of practice, Mr. Snider, and in your twenty-five years of holding a Treasury card, you knew the difference between the civil assessment phase liability and criminal fraud, did you not?

A Some.

Q Well, I mean that you knew they were different departments?

A That is correct.

Q And you certainly in the past thirty-four years heard of the Intelligence Unit and its counterpart in the prior years, have you not?

A I certainly have.

Q Can you tell us why, then, with thirty-four years in the prac-

tice and twenty-five years with a treasury card, and knowing that Agent Sullivan of the Intelligence Unit was in this case, as you say, at least two weeks prior to the time these records were turned over, from the Intelligence Unit, that it was the criminal fraud investigative unit, why you found it necessary to do your business with Giles Kavanagh who was a Collector of Internal Revenue and had nothing to do with the criminal fraud case, rather than A. C. Grunewald who was the Special Agent in charge of the Criminal Fraud Unit, why?

A You want the truth?

[110] Q We always want the truth when you are under oath.

A All right. I saw Mr. Grunewald too, and he told me the same thing, too, that there would be no criminal prosecution.

Q Oh? When did this take place?

A It took place after the books were handed over.

Q Mr. Grunewald did?

A That's correct.

Q That is not in the affidavit, is it?

A I didn't want to bring in Mr. Grunewald.

Q Well, you brought in Mr. Kavanagh, why do you distinguish between Mr. Grunewald and Mr. Kavanagh? They are both dead.

A There is no special reason why I did. I saw no reason for bringing in Mr. Grunewald.

Q Well, Mr. Grunewald, nevertheless, was the Chief of the Intelligence Unit, the Criminal Fraud Unit, as opposed to Mr. Kavanagh, who was merely the Collector of Internal Revenue, and had no more to do

with the criminal tax case than yesterday's newspaper, did he?

MR. WALTER. Object.

A I would rather answer that, counsel.

MR. WALTER: All right.

A I did not want to inject that, Mr. Woods, but you are forcing me to something that, in all due respect to the dead, I don't want to do.

Q Well, --

[111] A Let me finish, please, with the Court's permission.

Q Just make it responsive to the question.

A All right.

Q Why?

A Just a moment, please. When I told Mr. Kavanagh about these books, he actually told me that he contacted Mr. Grunewald and Mr. Grunewald told him that we can turn the books over and that as far as he was concerned there would be no criminal prosecution.

Q Now, sir, who was concerned? Grunewald?

A That is correct. He assured Mr. Kavanagh -- he gave Mr. Kavanagh the assurance --

Q You talked with Mr. Grunewald yourself?

A I did myself, too, after that. I went over to meet him. Giles told me "It wouldn't hurt none for you to go over and meet Mr. Grunewald." I went over and I met Mr. Grunewald.

Q When was this?

A During the course of this conversation.

Q What conversation and what is the time and date on that?

A It would be about the time that the books were being handed over, either immediately before or immediately after, or both.

Q We'll get back to that in a moment. But why, then, on the 24th day of February, 1949, when you turned these books over to the Agents, one was a Revenue Agent and one was an Agent of the Criminal Fraud Unit, did you make no mention whatsoever "Why, here you are, this is for the civil case, now that we understand that there is no criminal [112] tax case", when right before you a Criminal Fraud Agent was standing and took the books from you? Why?

A The reason is very obvious, Mr. Woods.

Q Not to me. Tell us.

A Well, I'm telling you it was very obvious. I had my discussion with Mr. Kavanagh and I did not think it was necessary for me to tell them what the understanding was between us.

Q What was the conversation with Mr. Grunewald? Let's go to that. That's the thing we haven't heard about. What was the conversation, as best as you can recall?

A The conversation was: He confirmed the conversation that Mr. Kavanagh had with him.

Q Well, let us start with point one: You went over to meet Mr. Grunewald?

A That is right.

Q All right, sometime in the immediate point of time that you talked to Giles Kavanagh?

A That's right, before and after.

Q Wait a minute, "before and after" what?

A Before and after the books were turned over. I saw Mr. Grunewald on two different occasions.

Q All right, let's have the first one. When was that?

A The first one was when Mr. Kavanagh asked me to go and meet Mr Grunewald, to get to know him.

[113] Q So you went over, is that right?

A I went over.

Q By yourself?

A By myself.

Q Who introduced you?

A I introduced myself.

Q You had not met Mr. Grunewald in all of your years of practice, have you?

A I had not.

Q What was the opening wedge of conversation on this occasion, do you remember?

A I don't believe it would be fair for me to tell you I do remember.

Q All right, tell us what you do remember of the conversation?

A We started talking about the case, that I represented Dr. Biggs. I gave him a little background about the doctor.

Q What was this background you gave him?

A Just where he was located, at the Osteopathic Hospital in Highland Park, and --

Q Did you tell him that Agent Krieger was apparently investigating

the doctor?

A I don't recall exactly, Mr. Woods.

Q Did you tell him that the Special Agent Sullivan was investigating the doctor?

A I believe that there was some conversation that somebody from [114] his Department was in on the case.

Q All right, that's the conversation we want to hear about. What was said with respect to that?

A There was nothing said about that. That was the sum and substance of the conversation.

Q All right, what was the rest of the conversation?

A He said, as far as he was concerned, there would be no criminal prosecution.

Q How did you get to the point of inquiring whether there was or was not going to be any criminal prosecution?

A I did not arrive at that point. He was the one that arrived at it.

Q How did you do that? Was he the first one that said, "Oh, Dr. Biggs, oh, yes, there isn't going to be any criminal prosecution"?

A Now, Mr. Woods, you are trying to put words in my mouth and I'm not going to fall for it.

Q If those were not the words, say so. Tell us as best as you can remember.

A I'm telling you as best as I can recall it. It was not complicated. It was not designed. It was an informal meeting with the man at

the suggestion of Mr. Kavanagh. It was not my suggestion. He said, "Norm, go over and meet Mr. Grunewald so he will know who you are, and you tell him the type of man you represent and give him a few of the highlights, if he wants any of them."

[115] Q Hm, hm.

A I did that. And after I got through with Mr. Grunewald, he said, "Mr. Snider, as far as I am concerned, at this point, I don't think there will be any criminal prosecution."

Q He said "I don't think there will be any criminal prosecution"?

A Words to that effect. In other words, as far as he was concerned.

Q "There was not"? Period.

A That's precisely what he said.

Q So that was something stronger than to the effect "I don't think there is going to be any criminal prosecution".

Did you make an inquiry of Mr. Grunewald as to why the Criminal Fraud Agent out of the Intelligence Unit was on the case investigating? Why? If there wasn't any criminal tax case pending or contemplated? That must have arisen in your mind, hadn't it?

A Well, that was in the embryonic stage of gathering the evidence, Mr. Woods And for me to answer you why, I can't answer it.

Q Embryonic stage. Why, by this time Agent Krieger had spent considerable time at the Osteopathic Hospital, had he not?

A I wouldn't know that. When you say considerable length of time, --

Q Had he been out to the Osteopathic Hospital? Do you know that?

A He will best answer that when he takes the stand.

[116] Q You don't know, then?

A How could I know what Mr. Krieger did?

Q Did you have any reports from your client, Dr. Biggs, that that had been the case?

A He said that the agents had been out to the hospital to look over his records.

Q That's fine. That's what we want to know. Once, or more than once?

A Well, naturally, it would be more than once, to get records.

Q Twice or three times?

A Maybe.

Q Did you have any knowledge by that point that the Agents had contacted the insurance companies?

A I wouldn't know, Mr. Woods.

Q You don't recollect that?

A No.

Q When you said "embryonic stages", what did you mean by that?

A I mean the case was still in its early stages, investigation, and particularly so because they kept insisting --

Q Did you know that from Mr. Kavanagh or Mr. Grunewald?

A Know what?

Q That it was in its early stages of investigation.

A I knew it personally. I was in the case.

Q But you don't know how many times the agents had investigated this and investigated that, and yet you knew it was early in the investigation. Had Mr. Grunewald told you prior to March 24, 1949 that this case was in the early stages of investigation?

[117] A Well, aren't you a little confused as to the dates?

Q February 24, 1949?

A Well, you just said "March 24".

Q Excuse me. February 24.

A Rephrase your question and I might be able to answer that.

MR. WOODS: Read the question, please.

THE COURT: We will adjourn until tomorrow morning, 9:30. Gentlemen, mark the time, that's 9:30 in the morning.

(An adjournment was thereupon taken until the following day, Wednesday, October 12, 1955, at 9:30 o'clock.)

- - -

[118]

Detroit, Michigan,
Wednesday, October 12, 1955
9:30 o'clock A. M.

- - -

(COURT CONVENED PURSUANT TO ADJOURNMENT.)

- - -

(PARTIES APPEARED THE SAME AS BEFORE.)

- - -

MR. WOODS: May I proceed, your Honor?

THE COURT: You may proceed.

NORMAN M. SNIDER, having been previously duly sworn, resumed the witness stand and testified further as follows:

CROSS EXAMINATION (Continued)

BY MR. WOODS:

Q Prior to turning over the two Lawyer's Handy Books which are here in question, Mr. Snider, to Special Agent Sullivan of the Criminal Fraud Section, how many times had you talked to Mr. Grunewald who we know to have been the Chief of the Intelligence Unit of the Criminal Fraud?

A Once.

Q Once?

A That is correct.

Q Would you be able to approximate in point of time, prior to February 24th, 1949, when that time was?

[119] A It would be an unfair statement on my part to fix any specific time, but it was prior to February 24th, the date fixed here for the turning

over of the books.

Q Was it closer in the point of time to your initial employment as counsel for Mr. Biggs or closer in point of time to the point of turning over the records?

A I would say it would be closer to the employment.

Q Closer to the employment?

A That would be correct; yes, sir.

Q What was that conversation that you had with Mr. Grunewald, as best as you can recall?

A I think I explained it yesterday. There was no formality. I introduced myself. His deputy led me into his office.

Q What was his name? Do you remember?

A I don't remember his name, sir.

Q Mr. Kieffer?

A I don't think I could identify him if I saw him. He was a sort of portly gentleman, but I don't think I could identify him if I saw him in front of me this morning.

Q Did you make any presentment to Mr. Grunewald as to your side of the situation, desiring to settle the matter from a civil standpoint?

A I don't quite get the import of your question, Mr. Woods.

Q I think it is clear. Did you tell Mr. Grunewald that you desired to settle your client's difficulties civilly?

[120] A That was the nature of the conversation.

Q Did you recite any facts and figures of your client's financial position, such as net worth, or anything?

A There was no need to go into that phase of it, as to net worth.

Q What did you go into?

A Just a general discussion of who the doctor was and that there was a deficiency, -- there would be a deficiency -- I was satisfied of that myself, and after going into it, --

Q How were you satisfied of that at that point? Had you had an audit made of the doctor's affairs?

A Well, Mr. White, I don't think it's right --

Q Woods, W-o-o-d-s.

A Mr. Woods, I don't believe it is right for me at this time to tell you how I arrived at it. When a client employs you in a tax case, you go into the detail as much as you can ascertain, and I was satisfied that there would be a deficiency.

MR. WALTER. Your Honor, I would like to raise an objection at this point as to the pertinency of this line of questioning. We are here on the question of the suppression. We are not here on the merits of the tax case. There is a criminal indictment pending and I do object to any further questioning in this regard.

MR. WOODS: Well, --

THE COURT: Just a moment. It seems to the Court that this goes to the crux of the whole situation here, as to matters which the [121] Court will have to decide, and the Court would like to have all of the information available with respect to the matters that transpired. Now, to withhold any of that information from the Court is the same thing as saying "Well, the Court can have one-half of the information but it

cannot have the other half."

MR. WALTER: Your Honor, I have no objection to the statement that he went there to discuss the settlement of his civil liability, but to go into the figures he discussed, and how he obtained them, I just raise the question on that point, whether it is pertinent to this issue and whether it ought to be gone into since there is an indictment pending?

That is the only question I raise. I have no objection to stating the purpose of his visit or what he discussed, but --

THE COURT: All right, let us proceed to ask the question again.

Q (By Mr. Woods) How had you arrived that there was this deficiency in your client's financial affairs?

A Well, from the information he furnished me I was satisfied that there was a deficiency.

Q Approximately how much was that deficiency?

MR. WALTER: I object.

MR. WOODS: On what basis?

MR. WALTER: On the basis as stated before.

[122] THE COURT: Well, gentlemen, we are here confronted with this situation: This witness has made an affidavit. -- Mr. Snider, is that it?

A That is correct, your Honor.

THE COURT: -- concerning certain matters you discussed with your client and these matters were vital to you and they were vital to the Government because they concerned vital matters, under the

law. Now, if there were other matters than those that were disclosed by the affidavit of the witness, which affected in any manner the affidavit or the transaction we speak of at this time, the Court would be placed in the position that it may have been given a portion of the information that was available to the witness at the time but not the remaining information which the witness would choose not to disclose.

It would seem to the Court that since this matter has been brought before the Court in the manner that it has been and is before the Court now, that the Court should have the benefit of all of the information in order that justice may be done.

MR. WALTER: Your Honor, he asked about a conversation he had with Mr. Grunewald. Now, if there were figures discussed with Mr. Grunewald, I have no objection to that going in. But the question he now asked was: "From the information given to you by your client, how much deficiency was there?" That is the question he now asked.

[123] MR. WOODS: Bear in mind this man is your witness, Mr. Walter.

MR. WALTER: We did not go into this question on direct examination. But I say, he was cross examining about the Grunewald conversation, what occurred there, and now he has gone beyond that.

THE COURT: The Court will rule that if the witness has the information that he should answer the question.

Q (By Mr. Woods) What was the amount of that deficiency, Mr. Snider?

A I could not answer that because it took the Government several

months after its investigation to ascertain the correct amount.

Q Well, you had managed to ascertain that there was a deficiency, none the less?

A That is correct, but not the exact amount.

Q All right. Did you propose any amount of the net worth of Dr. Biggs to Special Agent Sullivan or Revenue Agent Krieger as a figure upon which to settle Dr. Biggs' case civilly?

A As near as I can recall there was some discussion between Mr. Krieger particularly and myself from time to time on the basis of net worth, and I believe ultimately they discarded that theory of settling this matter on a net worth basis.

Q Whose theory was this, settling on a net worth basis to begin with?

[124] A It was mine.

Q You mean they turned you down?

A That is correct.

Q What was that figure?

A There was no figure because we could not arrive at a net worth.

Q You don't recall some conversation with Mr. Krieger about an amount of some seventy thousand dollars?

A I do not, sir.

Q Did you ever have any conversation with Mr. Grunewald wherein you stated to Mr. Grunewald that Dr. Biggs' case was not a criminal case, in your opinion?

A I did not make such a statement to Mr. Grunewald.

Q Now as to the point of time that you talked to Mr. Grunewald, was that before or after Agent Sullivan made his appearance in this case?

A I believe it was before.

Q All right. When Agent Sullivan came into the case you knew he was a Special Agent, did you not?

A Pardon?

Q When Agent Sullivan came into the case you knew he was a Special Agent, did you not?

A At the first meeting with Mr. Sullivan I did not know it. I ascertained that after the second or third visit with the both gentlemen.

Q Did not Mr. Krieger introduce Mr. Sullivan to you as a Special [125] Agent?

A I don't believe he did. As I recall, he used the following language: "Mr. Sullivan is going to work with me on this case."

Q Well, I see. In any event, Mr. Snider, sometime before the 24th of February, 1949, when these two Lawyers Handy Books were turned over to Agent Sullivan, you knew who Agent Sullivan was and from whence he came, did you not?

A At that time I did.

Q Did it not strike you, after having had previously the conversation with Mr. Grunewald where you claim Mr. Grunewald said there was going to be no prosecution, that one of Grunewald's Special Agents, a Criminal Fraud man, had made his appearance in the case?

A I knew that he was in the case.

Q Did you not consider it of sufficient importance to go back to

Grunewald after his telling you there isn't going to be any criminal prosecution how come one of his Special Agents of the Criminal Fraud Section is now in this case? Didn't you go back to Grunewald with that question?

A You are pinning me down again to make a statement which I reluctantly want to make, Mr. Woods, and I don't want to be argumentative with you, and you'll pardon me, and I want to be excused if that is going to be your attitude.

Q All we want is answers to questions.

[126] A I'm going to give it to you, but I'm doing it very reluctantly because I'm having to quote a person that is deceased.

Q Well you've done it before, Mr. Snider.

A Well, I'll have to do it again because you're forcing me. If you want it, I'll give it to you.

Q You mean, are you reluctant also to answering these questions as to Mr. Kavanagh?

A That is correct. I don't like to quote him if I can help it.

Q All right, we've done it once, let's do it again.

A Very well, I'll tell you what in our discussions he told me to do, and I followed it.

Q Who?

A Mr. Kavanagh.

Q That's not who I'm talking about now. I'm talking about Mr. Grunewald. Did you go back to Mr. Grunewald after you found out Special Agent Sullivan, a Criminal Fraud man was in this case, and did you say "how come?" or anything of that sort?

A I didn't do it that way; no, sir.

Q How did you do it?

A I told you a moment ago, I will have to preface your former question and give you the conversation I had with Mr. Kavanagh on that point.

Q Answer my question, please. Did you again have any conversations with Mr. Grunewald after you found out one of his Criminal Fraud Special Agents were in the case?

[127] A I did.

Q All right, so you did have more than one conversation with Mr. Grunewald?

A I told you so yesterday, sir.

Q It is my understanding you said earlier this morning that you talked to him once?

A Once before the 24th.

Q All right, what was this next conversation? When was it? And what was it?

A Well, it came about this way.

Q When?

A Oh, it would be sometime after the books were turned over. The doctor called me--

Q You mean Dr. Biggs?

A Dr. Biggs, and he said he was very much upset, he was very perturbed because letters were being sent to patients to see -- I don't know whether it was Mr. Sullivan or whoever it was that was appointed to

see and to give a report either in person, I believe, or by letter of what the relationship was, and how much they had paid to Dr. Biggs, and Dr. Biggs was apprehensive that it would be very harmful to him.

Q Hurt his doctor-patient relationship?

A That is correct. So I then paid a visit -- I called Mr. Sullivan and I spoke to him about it.

Q When was this, now, still subsequent?

[128] A That would be subsequent to the 24th of February.

Q Still in February, or sometime after?

A No, that would be after February because, Mr. Woods, you must understand that when they got the books they had to break it down.

Q What I mean, was it six months after, a couple or three weeks?

A No, no, no, that would be some weeks after the mechanics of the letter sending began with the Department.

Q All right, fine. Then what happened?

A Then I spoke to Mr. Sullivan and he told me he was just following a routine matter.

THE COURT: Following what?

A Following routine matter.

Q (By Mr. Woods) You called him?

A Yes, I went over and I visited with Mr. Sullivan or in the office in the Barlum Tower.

Q All right.

A And he said he was following routine. And I said I would appreciate very much if in any other way they could proceed so as to not

embarrass the doctor, and he assured me and reassured me that he had no authority to do any different than what he was doing.

Q Mr. Sullivan had never told you that there would be no criminal prosecution, had he?

A No, but I can qualify -- well, I had better not say it.

[129] Q Well, let's have it.

A Well, I don't want to --

Q Mr. Sullivan can take care of himself up there.

A I don't mean Mr. Sullivan at all.

Q Whom do we mean?

A I mean Mr. Kavanagh. Let me tell it now and let's have the record clear, please.

Q All right, lay it out.

A All right, I will do so. When I had my discussions with Mr. Kavanagh I asked him specifically whether I should take the matter up with the Agents that were in the case and he said "Norm, I don't want you to discuss the matter with them at all. Help them, assist them. Let us get the tax case settled as soon as we can, and leave the rest to me." That's just about how he put it. So I had no occasion to discuss with Krieger, with Sullivan or with anyone that followed thereafter any phase of the criminal end of this matter.

Q But you did go to Grunewald?

A I did go to Grunewald, yes, I did, because Kavanagh had talked to Grunewald.

Q Who told you that?

A Mr. Kavanagh.

Q Is this on the first occasion that you talked to Kavanagh about the Biggs case?

A Not on the first occasion, but on a series of occasions. This [130] was not just one discussion. Now, do you understand why I said what I did? And I was very reluctant.

Q No. Let's just confine ourselves to questions and answers, and I'll worry about how it sounds.

A Very well.

Q So that sometime after February 24th, 1949, after Dr. Biggs informed you that certain of his patients were being circularized by apparently Special Agent Sullivan or Internal Revenue Agents, in any event, you saw or talked to Mr. Grunewald again; isn't that correct?

A That is correct.

Q All right, let us have that conversation, when it was and what it was?

A It must have been -- it was sometime after I had seen Mr. Sullivan at the office. The Doctor called me after that again and he said: "Is there ever going to be an end to these letters going out?" It continued for weeks and weeks and weeks. So I said to the Doctor, "Doctor, there is only one thing I can do here. I will go over to see Mr. Grunewald and try to ascertain from him, if it will relieve your mind, to see whether or not there is going to be any end to this letter sending. I made an appointment to see Mr. Grunewald; I spoke to him --

Q Who all was present?

A Mr. Grunewald and myself, no other person or persons.

Q Who took you in at that time?

[131] A I don't know whether it was his deputy or I just asked for him at the desk and I was able to go in and visit with him.

Q All right, what was the conversation had with Mr. Grunewald on this second occasion?

A It was specifically -- not specifically, but mainly on the question of how long did he think this letter sending would continue.

Q You asked him that?

A I did.

Q You informed him that Dr. Biggs' patients were being circularized?

A That is correct.

Q What did Mr. Grunewald say?

A He gave me the approximate answer that Mr. Sullivan did.

Q Which was?

A Which was that it was routine of the office; that it wouldn't be right for him, Mr. Grunewald, at this point, to attempt to tell Mr. Sullivan or whoever was in charge of it to refrain from continuing the sending of those letters.

Q Did he tell you why?

A He didn't tell me why. I'm giving you what he said, that it wouldn't be good policy, as far as he was concerned, for him to attempt to tell an agent that is under him, -- it wouldn't be good policy not to continue to follow through with the so-called letter writing.

[132] Q Whose idea was the letter writing, Grunewald's or Sullivan's? Or, did you get that impression?

A That was the Government's procedure. I don't know whose idea it was. It was there, that's all.

Q Is that the sum and substance of that conversation, or was there more?

A No, it was not the sum and substance. I did say to Mr. Grunewald: "Now, Mr. Grunewald, with the way this matter is now going, do you still think that there will be no criminal prosecution? Tney seem to be going pretty strong on this letter writing thing."

Q Ever since Sullivan had come into the case?

A That is correct. And he said: "Well, Mr. Snider, as far as I am concerned, as I see it now, as far as I am personally concerned, there won't be any criminal prosecution."

Q He said as far as he was "personally" concerned?

A That is correct, sir.

Q Didn't that leave a doubt in your mind at that time as to what it might mean, that the Internal Revenue Service would think about it?

A I can't tell you what he had in his mind at that time, sir. You asked me for the conversation and I am trying to give it to you. It is several years since this all took place.

Q We appreciate that. If you can't remember, just say so.

A Well, I just answered I can't remember what went through his mind.

[133] Q How long did this circularizing continue, then?

A That, I can't tell you, sir.

Q Is it not a matter of fact, Mr. Snider, that you were made aware of the fact that these patients were being circularized in February, 1949, several days before the books and records were turned over on the 24th day of February, 1949?

A I was not apprised of it, sir.

Q And, consequently, it would not be true that the reason that the books and records were turned over on the 24th day of February, 1949, was because of the fact that Dr. Biggs was afraid of having his clients circularized?

MR. WALTER: Object to the form of the question. It is argumentative.

THE COURT: What is that?

MR. WALTER: I say I object to the form of the question. The form of the question is argumentative.

THE COURT: He may answer.

A I can't answer that question justifiably because I can't tell what was going through the minds of the people that were doing what they were doing.

Q (By Mr. Woods) Did you not know prior to the time the books were turned over on the 24th of March [February] 1949, that the agents intended to circularize?

A I couldn't tell you that, sir.

Q Had not Special Agent Sullivan informed you of that fact in a [134] meeting at your office?

A No, sir, he did not, not to the best of my recollection.

Q Were you not aware prior to the 24th of February, 1949, that Revenue Agent Krieger and Special Agent Sullivan had the names and the addresses of Dr. Biggs' patients for the years 1944, '5 and '6?

A I did not know of any such thing, sir.

Q You were never informed of anything like that by Agent Krieger or Agent Sullivan?

A No, sir.

Q All right, I would like to have you look at this affidavit again, if you will, please, which is Petitioner's Exhibit No. 2 (handing exhibit to the witness)? I would like to have you explain to us, Mr. Snider, if you can, why it is stated in this exhibit

"Although it is possible that Deponent" --

that would be yourself --

-- "may have misunderstood Mr. Kavanagh, Deponent, Mr. Snider, gained the impression that Mr. Kavanagh had ascertained" --

to carry it on. Why was that put in there?

A I believe your question is unfair to this extent.

Q Let's not worry about whether it is unfair. If you can answer it, answer.

A I am going to answer it if you will give me an opportunity, sir. [135] This affidavit has to be looked upon from all four corners of the affidavit and not take just one isolated sentence or word.

Q I think you are probably correct, but isn't the affidavit fairly

unequivocal as to what Mr. Kavanagh stated in the other parts of the affidavit? Why was it necessary to follow up these unequivocated statements by saying

"Although it is possible that Deponent may have misunderstood Mr. Kavanagh"?

Why was that included?

Was it because Mr. Kavanagh was still alive at the time that the affidavit was made?

A Well, now, do you want to dig up the dead again?

Q Let us not worry about that. Answer my question.

A I can't answer your question, sir.

Q Why was it put in there the way it was put in?

A Because it is the truth and I so stated it, and it is the truth.

Q Well, then, you may have misunderstood Mr. Kavanagh?

A I did not misunderstand Mr. Kavanagh.

Q Your affidavit says you may have misunderstood him.

A Well, yes, but you have the preface "Although it is possible".

Q All right, it is possible, and now you are saying it was not possible.

A I'm not saying that it is or that it was not possible. You read [136] the affidavit from all four corners, Mr. Woods, and I think you can get the import of what transpired between Mr. Kavanagh and myself.

Q All right, let us drop that for a minute and go on to this: We heard yesterday for the first time that Mr. Grunewald also had told you that there would be no criminal prosecution. Whom else had you told that

Mr Grunewald had made that statement, prior to your coming to this courtroom yesterday?

A I have never told that statement to anybody.

Q And yet at the time that you made that affidavit -- what was it, February 1950?

A No, June of 1952.

Q Excuse me, June of 1952. You were interested in putting down the absolute facts as best as you could recall them at the time you made that affidavit, were you not?

A That is correct, sir.

Q Why, then, did you not at that time also make an affidavit or make known to some of these interested parties that Grunewald who in fact was the Head of the Criminal Fraud Unit also told you that there would be no criminal prosecution instead of waiting until yesterday here in this courtroom to do it? Would that be because --

A Just a minute Don't give me no "because". I'll answer the question

Q Yes. You have the question before you?

[137] A Yes, sir. If you will recall yesterday, Mr. Woods, when Mr. Raymond Cashen was on the stand, that the reason for my affidavit was a prelude to some dickerings that were had with this Mr. Lynch of the Intelligence of Justice Division in Washington; that he wanted to know, Mr. Lynch, as I gathered, what the conversation was between Mr. Kavanagh and myself, and that they wanted the affidavit. They asked Mr. Cashen and whoever was with Mr. Cashen in Washington to produce such an

affidavit of the conversation between Mr. Kavanagh and myself.

Q That's fine, that's fine. I appreciate that. I think we all understand that. But why did you wait until yesterday to come up for the first time with the information that Grunewald, who was the Head of the Criminal Fraud Unit, had also told you there would be no criminal prosecution when at the time of this affidavit Mr. Cashen apparently, was he not; interested in knowing the facts of tnis claim of immunity of Dr. Biggs from criminal prosecution?

A If you will ask the question bit by bit, I'll answer it as such. I can't answer it in the way you've got it all conjured up here. You are asking four questions in one question, sir.

Q I don't hear an objection to the form of the question. Please answer it.

A Well, I happen to be an attorney and I can't answer it if you put it in that way.

Q We are aware of that. Did you ever tell Mr. Cashen that Mr. [138] Grunewald made this statement to you?

A I told you previously I have never repeated that -- it was only upon your insistence, your insistence, that this came into the picture, and I told you why --

Q Did you ever tell anybody prior to yesterday about Grunewald?

A I didn't tell anybody.

Q Did you tell Dr. Biggs?

A No, sir, Dr. Biggs didn't even know.

Q Did you tell Mr. Walter?

A No, Mr. Walter did not even know.

Q Mr. Cashen didn't even know?

A I say no one knew about it but myself.

Q Why?

A Because it was the conversation with Mr. Kavanagh and Mr. Grunewald and the conversation I had, it was, you might say, between ourselves.

Q And yet you were never hesitant about making the affidavit in 1954 about what Mr. Kavanagh had said to you?

A Because the Washington Department did not want anything else but that

Q So that, because you were never asked for it, you had never told it?

A That is correct, sir

Q Well, then, at least, during the period of time you were representing Dr. Biggs, Dr. Biggs was not relying upon any promise of immunity [139] from Mr. Grunewald, was he?

MR. WALTER: Objection on his testifying what Mr. Biggs can testify to.

THE COURT: I didn't hear you, Mr. Walter.

MR. WALTER: I am objecting to the form of the question. He is asking what Dr. Biggs was relying on.

MR. WOODS: All right, I will withdraw the question.

Q (By Mr. Woods) You came into this case apparently in late 1948, in the month of December, isn't that correct?

A That is correct.

Q And sometime between the period of December, 1948, and the 24th day of February, 1949, you had had the Collector of Internal Revenue of the Eastern District of Michigan and the Chief of the Intelligence Unit, Criminal Fraud Section of the Bureau of Internal Revenue, both tell you that Dr. Biggs' case was not a criminal case, and there would be no criminal prosecution; is that correct?

A That is so, sir.

Q Well, having performed this service for Dr. Biggs, and having procured a promise from those two individuals that there would be no criminal prosecution, why were you substituted as attorney for Dr. Biggs?

MR. WALTER: Objection, your Honor, again to the form of the question.

THE COURT: He may answer.

[140] A You'll have to inquire -- well, I'll give you the reason, if you want the reason.

Q Well, that's what I asked you for.

A Well, all right. Dr. Biggs was very impatient about how long it was taking to get his civil tax case settled. He felt I was not able to effectuate a settlement soon enough for him, and, consequently, he felt he wanted different counsel to bring about a speedy settlement.

Q Mr. Cashen succeeded you?

A That is correct.

Q When was that?

A I was in the case, roughly, about three or four months.

Q And in those three or four months you had gotten these two promises from Kavanagh and Grunewald that there would be no criminal prosecution and Dr. Biggs did not feel you were settling the civil aspects quickly enough so consequently he substituted you for Mr. Cashen, is that correct?

MR. WALTER: Object to the form of the question.

A You have answered it yourself.

Q (By Mr. Woods) That's the substance of it? I want to be sure I understand you.

A You do.

Q Perhaps I asked this question, but I honestly don't remember whether I did or not. Why did you go to Mr. Kavanagh, who was the [141] Collector, rather than to Mr. Grunewald, who was the Chief of the Criminal Fraud Section, in the first instance, when you contacted an officer in the Internal Revenue Department?

MR. WALTER: Your Honor, I think that was all covered yesterday.

MR. WOODS: Well, I don't recall the answer. Maybe it was asked.

THE COURT: That often happens in the trial or a hearing, that counsel has forgotten whether a certain matter had been gone over or not.

You may answer the question.

A I had known Mr. Kavanagh since about 1930.

Q And you didn't know Mr. Grunewald?

A And I did not know Mr. Grunewald until Mr. Kavanagh asked me to go over and become acquainted with him.

Q How well did you know Mr. Kavanagh?

A I tell you I knew him since 19 -- I met Mr. Kavanagh in 1930.

Q I have known you since yesterday, but that doesn't say how well we know each other. How well did you know Mr. Kavanagh? Were you social friends?

A No, but we campaigned throughout the state, the length and the breadth of the state.

Q Once, or more than once?

A 1930 and 1932.

Q Over the period of years, did you see each other socially at all?

[142] A We would have lunch, we would meet at gatherings, political, and the likes.

Q Did you have any lunches, any gatherings with Mr. Kavanagh in December of 1948 and January and February of 1949?

A Mr. Woods, I did not keep any specific record of --

Q Answer my question. You are not being quite responsive.

A I can't recall.

Q You don't recall?

A No.

Q In December of 1948 or January and February of 1949, were any gifts ever given by you to Mr. Kavanagh or asked from you by Mr. Kavanagh?

A I have never in my life given to Mr. Kavanagh anything of a gift or received one.

Q The answer is No?

A That is correct, sir. And I think your question is unfair, in deference to the deceased.

Q Just answer the question.

A Did you expect me to say that I did give him a gift?

MR. WOODS: I don't believe he is responsive, your Honor.

THE COURT: I think he answered it.

MR. WOODS: All right.

Q (By Mr Woods) When you saw Mr. Kavanagh, when you first came into the case representing Dr. Biggs, what did you tell him about the [143] merits of Dr. Biggs' case?

MR. WALTER: Your Honor, I think that has been gone into.

MR. WOODS: We covered Mr. Grunewald. I don't know as we've covered Mr. Kavanagh.

MR. WALTER: We did that yesterday, your Honor. We went into the whole detail of the Kavanagh conversation.

THE COURT: The Court is not certain whether that was gone over or not. The question may be answered.

A Will you please ask that again?

MR. WOODS: Yes, sir.

Q (By Mr. Woods) At the time you made the initial contact with Mr. Kavanagh, after you had been employed by the Doctor to represent him, what information did you give to Mr. Kavanagh as to the Doctor's case?

A As near as I can recall, we went over the so-called highlights of his case.

Q What were the highlights?

A Well, now, just a moment, if you will permit me, sir. That in my judgment there was a deficiency; that I felt that the deficiency was such that it could be settled in a civil matter, and that I had informed the Doctor that it should be settled. And, as I say, I told Mr. Kavanagh that I would like very much for him to meet the Doctor so that he could get a first hand, whatever it was, about the case. Get to know the man whom [144] he is dealing with. I believe I answered it just that way yesterday.

Q You knew, of course, at the time and at all times that Mr. Kavanagh had nothing to do with criminal fraud cases, did you not?

A No, sir, I did not know that.

Q What did you know his position to be in the Revenue Department?

A Mr. Kavanagh was interested in collecting the tax.

Q He was the Collector, was he not?

A That is correct, sir.

Q And in your thirty-four years as an attorney and holding a Treasury card for twenty-five years, you knew the difference between a Collector and Special Intelligence Unit which investigated criminal fraud cases, did you not?

A I did.

Q So that you knew that Mr. Kavanagh had nothing to do with criminal fraud cases?

A I would say Yes and No.

Q Explain it, if you would like.

A Departments work with each other, and Mr. Kavanagh in his capacity, if in his own and the way he felt about the case, I was satisfied and he was satisfied, that this could be a settlement of a civil tax matter

Q Had not Mr. Krieger and Mr. Sullivan at all times continually requested your client through you, as his counsel during your period of [145] representation prior to February 24, 1949, repeatedly requested if there were any other books and records of the doctor?

A I volunteered I would do all in my power and capacity to furnish whatever information --

Q I'm sure you did. But did they not repeatedly ask if there were any --

A I so stated yesterday.

Q When was the first time that Dr. Biggs informed you that there were these additional records that were turned over on the 24th of February?

A Sometime in February. That would be prior to the 24th.

Q Was there any reason why you did not tell your client, Dr. Biggs, about your conversation with Mr. Grunewald?

A I don't know how long you have been practicing law, Mr. Woods.

Q Not thirty-four years.

A Well, I hope you live to practice at least thirty-four years and then maybe you'll understand.

Q Well, we are just wasting time.

A Just a minute. Then you'll understand what I'm trying to tell you.

Q Did you, or didn't you?

A As an attorney, as an attorney, sir, you don't give your client every move that you make to bring about a successful end of whatever the situation may be, or the lawsuit. You cannot go through with [146] your clients step by step whom you see, whom you are talking with and what you are doing. You go about and settle your lawsuit.

Q Don't you ordinarily do that in order to compute the reasonableness of your fee, Mr. Snider?

A That is beside the point. The results obtained enters into your compensation, the time you spend. You may spend in some lawsuits, my dear friend, my dear young friend, if you don't mind, --

Q Just Mr. Woods.

A -- a few days, but if the accomplishment is such that you have really accomplished a worthy settlement, your fee should be commensurate with the lawsuit that sometimes takes you a year or so to bring about a settlement.

Q Well, is the sum and substance of this answer, then, Mr. Snider, that you did not feel it necessary to discuss all of your tactical moves with your client?

A I think that would be a fair statement, sir.

Q What was your fee from Dr. Biggs?

MR. WALTER: Object, your Honor. I don't know that that is pertinent to this issue.

THE COURT: What was that question?

MR. WOODS: What was his fee from Dr. Biggs for his representation during this three to four months?

THE COURT: What would that have to do with the issue [147] presented by the Petition?

MR. WOODS: All right, we will withdraw the question. No further questions. Your witness, counsel.

MR. WALTER: Nothing further.

THE COURT: You may step down.

(Witness excused.)

MR. WALTER: May we have a short recess at this time, please?

THE COURT: No.

MR. WALTER: Your Honor, when we started this matter yesterday morning, you made the statement that you wanted to hear the testimony of Dr. Biggs, and I would --

THE COURT: Put it this way now, Mr. Walter: In view of the previous appeal and the mandate that came down from the Court of Appeals, I was impressed with the idea that the Appeal Court felt that the Petitioner himself should be heard, and I made that statement. However, we were not on the subject matter at that time, and it was made in connection with some other talk that we had.

MR. WALTER: That's right.

THE COURT: Whatever you wish to do in that matter, that would be a matter for your own judgment.

MR. WALTER: Your Honor, when we started yesterday morning, and we put Mr. Cashen on, it was for the purpose of identifying certain records, but during cross examination that developed much further [148] than we expected, and the same way with Attorney Snider.

Now, we will be glad to offer Dr. Biggs who will corroborate the same testimony we have in the record at this time and we will be glad to offer him if we can offer him for the limited purpose of testifying as to what occurred --

THE COURT: Is he in court?

MR. WALTER: He is in court.

THE COURT: If he is in court and you want to put him on, why don't you put him on?

MR. WALTER: I don't want to expand into the criminal aspects of the proceeding. I don't want the witness to be --

THE COURT: You can be assured that nothing that is connected with the criminal prosecution will be aired here in this proceeding, because this proceeding is not for that purpose.

MR. WALTER: That's right, it's for the simple purpose of determining the facts on the motion to suppress.

THE COURT: The only purpose of this hearing is for the Court to determine whether Dr. Biggs' petition to suppress the evidence should be granted or not, and the property returned to him, if he does not have it now.

I don't even know where the books are at the present time.

MR. WALTER: I have the books right now, your Honor.

They were returned by the Department.

[149] THE COURT: It is only a question of the matter of suppressing them. That's the only issue before the Court.

MR. WALTER: That's right.

Dr. Biggs, will you take the stand?

DR. RAYMOND A. BIGGS, the Petitioner herein, was thereupon called as a witness in his own behalf and, having been first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. WALTER:

Q Dr. Biggs, will you please state your name and address, for the record?

A Raymond A. Biggs, 8691 East Outer Drive, Detroit.

Q And will you keep your voice up so that we can hear your testimony? What is your profession, Dr. Biggs?

A Osteopathic physician and surgeon.

Q How long have you been in that profession?

A Since July, 1926.

Q Were you contacted by an Agent from the Internal Revenue Department in December of 1948?

A Yes, I was.

Q Who was that Agent?

A Mr. Krieger.

[150] THE COURT: Mr. who?

A Mr. Krieger.

Q (By Mr. Walter) When he contacted you, how did he identify himself?

THE COURT: Just a minute. What was that date?

MR. WALTER: In December of 1948.

THE COURT: All right.

Q (By Mr. Walter) Did he identify himself as to his capacity with the Department when he first contacted you?

A He wrote me a letter just stating that he would like to check the years 1944, '45 and '46. No identification other than that he was with the Internal Revenue Department.

Q Did he later on, when he contacted you, also decide to include 1947?

A That is right.

Q After your first contact with him, did he request certain records to be turned over that were available at that time?

A He asked to see the records that we had available at 11025 Gratiot.

Q And those records were turned over to him at that time?

A That's right.

Q Now, as the relationship continued, did you find it necessary and desirable to retain counsel?

A I did. I had an attorney that did ordinary legal work and at [151] first, the first meeting or two, he met with Mr. Krieger and I believe I met with Mr. Krieger and Mr. Waldmann at one time.

THE COURT: How do you spell that?

MR. WALTER: W-o-i-d-m-a-n.

THE WITNESS: Pardon me, it's W-a-l-d-m-a-n-n.

Waldmann advised me to seek a tax attorney as he did not do that type of work, which I did.

Q (By Mr. Walter) And in due time you did retain Mr. Snider?

A I did.

Q And was that in the latter part of December, 1948?

A That would be in the latter part of December, 1948.

Q After you had retained Mr. Snider, was there ever a conversation with him about Mr. Kavanagh?

A He mentioned to me, -- Mr. Snider mentioned to me that he would talk with a Mr. Kavanagh in regard to my tax matter and informed me that he had talked with him and that he had arranged a luncheon for the three of us to meet and talk it over.

THE COURT: And that he would arrange what?

A A luncheon.

Q (By Mr. Walter) Now, who was Mr. Kavanagh, so far as you knew?

A So far as I knew, he was head of the entire Internal Revenue Department. I was just a layman in that respect. I didn't know but what he had charge of the entire Department.

Q Now, was such a luncheon meeting arranged?

[152] A Yes.

Q And did you attend a luncheon meeting?

A I did.

Q And were Mr. Kavanagh, Mr. Snider and yourself present at that luncheon meeting?

MR. WOODS: Time and place?

Q (By Mr. Walter) You recall the time and place that that occurred at?

A Well, it was some time, as I recall, between the 20th and the 30th of January of '48.

Q January of '49?

A January of '49.

Q Where was the luncheon, do you recall?

A That was, I believe, at the Ole Wayne Club at the time. I'm not saying that for sure.

Q What conversation occurred at that luncheon insofar as this matter is concerned?

A Well, we met, and he asked me --

MR. WOODS: Who is "he"?

A Mr. Kavanagh asked me if I was having some tax difficulty, and I said Yes, I was, and he said, "Well, I guess that is what we are here to talk about," and so we began. We had lunch and we talked over my tax difficulty in this matter, that I was just being investigated by Mr. Krieger. It was in this way, that he was in there checking up on my records. Also, we talked about two or three doctors that he was acquainted [153] with, and that I was acquainted with, and apparently he had heard of me through these men before. He just asked me if I knew them and he mentioned the fact that he had doctored with both of them and he also men-

tioned the fact that he had been doctoring some for his heart, and we talked a little bit along medical lines.

Q (By Mr. Walter) Was anything said in that conversation about the nature of this investigation, as to whether it was a civil investigation or criminal investigation?

A He said he had talked with Mr. Snider and that he felt that my taxes could be settled all right. It is just a matter of us getting together and determining the tax, and that "as soon as you can get together with Mr. Snider and the Agent and determine the amount, why, we'll come to a settlement on the case."

Q Now, did you have any other meetings with Mr. Kavanagh following that first meeting?

A The first meeting he talked to me quite a little bit, as I say, about other doctors and his health. He said to me "If you ever want to talk to me again about your tax matter, call me and come down and see me." And I did go down to see him.

Q You did go down to see him?

A I went down to see him,

Q When did you go to see him again?

A I saw Mr. Kavanagh on three occasions after that at his office. [154] I called on him about two weeks before I turned those books over and I called on him on two occasions after that.

Q Now, when you saw him on the occasion before you turned the books over, what was your conversation with Mr. Kavanagh?

A Will you repeat that again?

Q When you saw him on the occasion before you turned the books over, what was your conversation with Mr. Kavanagh?

A I went down to see him along about the middle of January and I believe the only meeting --

Q Are you correct about that? Was it January, or February?

THE COURT: Before you go any further, will you ask him what date these books were turned over to Mr. Kavanagh?

MR. WALTER: February 24th.

THE COURT: No, ask him. Ask the witness that.

Q (By Mr. Walter) What date were the books turned over to the agents?

A February 24.

Q 1949?

A Yes.

THE COURT: To whom were they turned over?

A These books were placed on the desk in Mr. Snider's office. I really didn't turn the books over to the agents, I gave them to Mr. Snider and they went up to the desk and with the permission of Mr. Snider they picked those books up and fanned through the books and asked me a few questions about them, and I sat down, and I would say it was probably ten [155] or fifteen minutes; and we went over some of the items they wanted to ask me about and I answered them.

Q (By Mr. Walter) That was on February 24th?

A That's right.

Q The date the books were turned over?

A That's right.

Q Now going back to the meeting you had with Mr. Kavanagh just prior to the time the books were turned over, what conversation occurred at that meeting with Mr. Kavanagh?

A When I went over to see him I talked to him about the fact that they were writing my patients or writing patients that had been referred to me for surgery and asked him if that was necessary, that my definite understanding from him, when I met him at this luncheon, was that my tax was purely civil, and why would it be necessary to write all of these patients on the type of letterhead that it was being written by Mr. Sullivan. And he said it was purely routine, "pay no attention to it, it is purely a matter to estimate the tax, and we did it with grocers and all other types of investigation of that nature; they wrote purely as a matter to determine the amount of tax," and for me not to worry any more about it. It was purely a civil case and for me not to worry any more about it, to go on.

Q Was there any discussion with him on that occasion as to whether [156] or not you had any other records that you could furnish to the --

A There was not anything mentioned about records except this. He asked me if I had any records I could turn over, and I said I didn't know, that I would look around and see, but that I didn't know at that time whether I had any records or not, but I would check and find --

Q Did he say to you it would facilitate the investigation if you could find any other records?

A Yes he said if I could come up with records that would let them know --

THE COURT: Mr. Walter, I wish you would not place the answering words in the mouth of this witness, but that you would ask him question by question and let us have his version of it, and not yours.

MR. WALTER: I am very sorry.

Q (By Mr. Walter) What did he say?

A He asked me if I had any records I could turn in so that they could better and quickly come to an account of any tax that I owed, if I had any that I did, and I said I would check and see, and if I could find any I would turn them in. But he assured me that if I did turn in any records that they would not be held against me in any way, shape or form; that it was purely a civil case.

MR. WOODS: Who was "he"?

A Mr. Kavanagh.

[157] Q (By Mr. Walter) Following that conversation with Mr. Kavanagh, what did you do?

A Well, I just went along about my routine of work and I was then contacted by Mr. Snider. Snider had asked me two or three times if I had any records on more than one occasion that I could turn in, it would help him come to a conclusion, to a decision. He said he had talked to -- "you heard Mr. Kavanagh say yourself that if you turned these records or anything you might have, that would help bring this case to a close much quicker." And after many times of talking to me, I thought it over and I called Mr. Snider and I said to him, I said, "Now, if you can assure me that any records I will turn in will not be held against me to criminally prosecute me, I will look and see if I can find something that might help you."

He said that I had the assurance. I said, "If you need any consultation in this case at all, now is the time to get it." He said, "I will let you know tomorrow." So the next day he called me and said he had thought it over over-night and that since he had been advised by Mr. Kavanagh that it was a civil case he thought he would go over and talk to him. He said, "I'll go over and talk to him and then I'll go and get in touch with you later this day." So he went to see him, called me back, and told me that he had Mr. Kavanagh's assurance again. He said "I've told you again, and I've told you many times this is a civil case, and if you have any records turn them in and we will quickly come to a settlement on the case." From [158] that information I told Mr. Snider then that I had two books which I could turn in on 1946 and 1947, that I did not have anything on '44 and '45 because I did not collect the accounts at that time. So he said "I will arrange a meeting with the Revenue Agents if you will bring the books down." And so that is what he did. And I have already said what happened.

Q (By Mr. Walter) Did you have any conversation with Mr. Kavanagh after the books were turned over?

A Yes, I did. I went down to see him two times, on two different occasions.

Q When did that occur, the first conversation?

A Well, that occurred some little time after they had been turned over. I would say probably three or four weeks.

Q And where did that conversation occur?

A In his office.

Q And what occurred in that conversation?

A Well, I just went down -- he asked me to stop in any time I wanted to, so they were still sending out -- at least they had been right along, I don't know how long it took them -- it took them about two-and-a-half weeks to pick up the material at the hospital, and they started immediately to send out these circulars. So I just asked him if everything was satisfactory. And he said my case was just exactly like he had told me and he assured me again that there was nothing to worry about, that [159] everything was going all right and that my case should be settled in a short time. And I went to see him again. The last time I went to see him, --

MR. WOODS: When?

A That was, well a short time before Mr. Sullivan left the Department. In fact, it was only two or three days before he left the Department, and he told me he was going to leave the Department and was going into his Department at that time, and he just assured me a short time that the case would be settled and that there is nothing further to worry about, and that my case was strictly a civil one. And the fact that I handed in my records would quickly facilitate their settling it.

MR. WALTER: That's all.

CROSS EXAMINATION

BY MR. KAESS:

Q Dr. Biggs, when was the first time that you were ever aware that anyone in the Internal Revenue was making a check of your return, any of your returns?

A Well, the first time was when I received the letter.

Q Would you give me that date again?

A It was sometime in December. I can't tell you exactly.

Q December of what year?

A Let's see, that would be December of '48.

Q Was that a letter on the stationery of the Internal Revenue Department?

[160] A Yes.

Q And what did you do then?

A I believe he asked me to call him, and that's what I did.

Q How soon after?

A Well, I called him right away, the next day or so.

Q And with whom did you talk?

A I talked with Mr. Krieger.

Q Where did you reach Mr. Krieger?

A Well, I don't know, I just called the Internal Revenue and told them I wanted to talk to Mr. Krieger and --

Q What was the phone number? Did you have the letter with you?

A No.

Q You know what the address is of Mr. Krieger?

A Well, I do now, but I didn't then.

Q Then did Mr. Krieger see you?

A Yes, he did.

Q How soon thereafter?

A Very shortly, three or four days.

Q Did he come out to your place of business, your office on Gratiot?

A In our telephone conversation he made an appointment with me for Gratiot Avenue.

Q And did you see him during the day?

A Yes, I did, sometime during that day.

Q Was anyone with you at the time Mr. Krieger met with you?

[161] A Yes.

Q Who?

A Mrs. Baumann.

Q Who is Mrs. Baumann?

A Well, she's a lady that has been helping me keep my records.

Q Your records were --

A At 11025 Gratiot.

Q She was your bookkeeper then at your clinic on Gratiot?

A Part of the time.

Q Was anyone with Mr. Krieger?

A I didn't see anyone else.

Q He was alone?

A Yes.

Q Did Mr. Krieger sit down with you and Mrs. Baumann?

A Yes, he did.

Q And did you have a conversation?

A Yes.

Q What did he ask you?

A He just asked me, -- he said he was making a routine check on my records and that he would like to see them.

Q And what did you say?

A Well, I turned them over to him.

Q You say you turned over all of your records to him?

A Correct.

Q What records did you turn over to him at that time?

[162] A Anything we had there.

Q Did you turn over everything you had there at that time?

A That's right.

Q You used the word "there".

A Yes.

Q Do you say that advisedly?

A. At 11025 Gratiot.

Q Did you have any records at any other place at that time?

A Yes, sir, I did.

Q Where?

A I had two books.

Q Are these the two books in issue here?

A Yes.

Q Those are the two Lawyers Handy Books, is that right?

A Right.

Q Did you have those in operation? Or, where were they being kept at that time?

A They were kept at the hospital.

Q Were they ever being kept in your clinic on Gratiot Avenue?

A No.

Q Why?

MR. WALTER: Object.

THE COURT: It may be answered.

A Well, they were not kept there for the simple reason that the work was strictly surgical and had nothing to do with my Gratiot office.

[163] Q You are saying that your books were kept at the hospital because it had nothing to do with your work at the clinic?

A That's right.

Q Is that an absolute statement?

A That's right.

Q You don't care to change that now, do you?

MR. WALTER: Your Honor, I'll object to going into this line of questioning now, about the contents of the books. That is not the issue here. The issue is the question of how the books were turned over.

Again, I don't believe we should go into the tax problem involved in the criminal case, and I do object.

MR. KAESS: This is not involved as far as the tax case. I think, the witness is on the stand and he has submitted himself for cross examination, and the issue is with respect to these books and the veracity of this man in his affidavit with respect to the time that these books were turned over I think is material. There is no jury here.

THE COURT: Only on the question of his veracity, and that's all. He may answer.

MR. WALTER: We would like to object to any questions having to do with the contents of the books beyond the fact that they are the books in question in this lawsuit.

MR. KAESS: I agree to that.

[164] THE COURT: The Court has stated the matter rather broadly, Mr. Walter. But, under certain circumstances there are certain objections to that rule, of course, and we cannot make a general ruling at any time during the case while it is in progress, but must await the developments in the case.

You may proceed.

THE WITNESS: I will change that in regard to it had nothing to do with that office. They did, but they were kept at the hospital because they were strictly surgery.

THE COURT: They were what?

A They were strictly a matter of surgical record and not a daily record of any other patients, and the record of surgeries sent in by the clinic at Gratiot was determined by the clinic anyway, even though it may have shown on the books that certain cases belonged to the clinic. They still knew exactly what they were sending to the hospital, more than I did, because I did not have the time to know that. I was too busy with the work and I didn't have time to know all of the work they sent.

Q (By Mr. Kaess) Then it is a fair statement to say that these two books, there was other work done that affected the clinic itself on Gratiot that had to do with the blue books. Isn't that a fair statement? Your people that worked with you, the other doctors that worked with you

in the clinic, didn't they refer work to you?

A They kept their own records. It may have shown in those [165] books, but they kept their own records. They didn't necessarily refer to those books themselves at all for a record of their work. They kept a record of all of their cases themselves. In fact, they knew better than I did, what they sent in.

Q Did you at that time, at the time of Mr. Krieger's visit with you on the first occasion, did you turn over all of the books that you had available to you at the clinic?

A I did.

Q And how long did this conversation last, this meeting last?

A With Mr. Krieger?

Q Yes.

A. Just a few minutes.

Q Did he take the books with him?

A No, he did his work there, as far as I can recall.

Q But he stayed only a few minutes?

A The first time -- he may have stayed two or three hours, but I didn't stay there very long.

Q And you don't know how long he did stay there, of your own personal knowledge, is that correct?

A No, I don't.

Q Did he return and have another meeting with you?

A I saw him again, as I recall, just for a few minutes, maybe ten or fifteen minutes.

Q When was that?

A It was a few days after that, four or five days after.

[166] Q What happened then?

A He just asked me if I had any additional records there.

Q What did you tell him?

A I told him No.

Q Did he stay for a while?

A Yes, he stayed. He was there right along, but I wasn't.

Q Did he have any conversations with you?

A About a ten-minute conversation.

Q What were the sum and substance of those conversations?

A Well, he may have asked me at that time something about what I owned, but we didn't go into any information until we got to Mr. Snider's office in regard to any property. He may have asked me that, though.

Q Did you go over it with him?

A I did.

Q Was there anyone with Mr. Krieger other than himself at that time?

A Mr. Waldmann.

Q Who is Mr. Waldmann?

A He was an attorney, my regular attorney.

Q He was your regular attorney. Is he the one that made out your tax returns?

A At that time, yes, he was.

Q Where is he located?

A He is located on Harper, near Harper and Gratiot -- I mean, [167] near Harper and Van Dyke.

Q When was the next visit from anyone from the Internal Revenue or Treasury Department?

A Well, my next visit, -- at that time I retained Mr. Snider and my next visit was in his office.

Q How did you happen to retain Mr. Snider?

A Through advice and recommendation.

Q Was there anything that happened at the time of your two visits with Mr. Krieger that indicated that you should employ other counsel than Mr. Waldmann?

A Other than that Mr. Waldmann advised me to get another tax attorney.

Q That's what I mean. You then did employ Mr. Snider?

A Right.

Q Was it at Mr. Waldmann's suggestion you employed Mr. Snider?

A No.

Q Whose suggestion?

A Another doctor friend.

Q Who is that?

A Dr. Ackerman.

Q Did you see Mr. Snider?

A I did.

Q When?

A Well, two or three days after Dr. Ackerman recommended him.

Q Where did you see Mr. Snider?

[168] A In his office.

Q This would be, according to your computation, a month after Mr. Krieger first called; is that about right?

A I would say three or four weeks, along in there.

Q How long did you meet with Mr. Snider at the time of your first call with him?

A I don't recall that.

Q Well, your best recollection.

A I would say probably an hour.

Q Did you have any books and records with you at the time you called on Mr. Snider?

A I did not.

Q They were still in your possession, however, were they not?

A Yes.

Q Did you at any time turn over those books to Mr. Snider?

A Pardon me?

Q At any time, did you ever turn over those books and records to Mr. Snider for examination?

A As I stated before, I turned them over on February 24th.

Q What year?

A 1949.

Q I'm not talking about the blue hand books. I am talking about

your regular records that you keep in the course of your regular business at the clinic.

A Mr. Krieger had already gone over those and didn't ask for [169] them anymore.

Q I'm talking about, did you turn over your books and records at the clinic to Mr. Snider, your then counsel?

A I did not.

Q Did he at any time ever examine them?

A No, he knew Mr. Krieger had been going over those books.

Q Just answer my question. Did Mr. Snider ever examine your books?

A No.

Q When is the next time you saw anyone from the Internal Revenue?

A After the first time with Mr. Snider?

Q Yes. We have had Mr. Krieger up there twice. Now when is the next time you saw anyone from the Internal Revenue?

A Well, I believe I stated this: I saw Mr. Krieger twice on Gratiot and I had met once with he and Mr. Snider at Mr. Snider's office. Now we are at that point.

Q That would be about the next visit that you saw Mr. Krieger, and that would be in Mr. Snider's office in a conference between the three of you, is that right?

A That's right.

Q Could you place the date approximately?

A No, I can't.

Q Would it be a month or two months after Mr. Krieger first called?

MR. WALTER: Objection, your Honor. I think the record [170] is amply clear about that meeting in January. There is no disagreement about that. That point is belabored. I think it is clear that that meeting was in the first part of January.

MR. KAESS: Of '49?

MR. WALTER: Of '49.

THE COURT: He may answer.

Q (By Mr. Kaess) Does that refresh your recollection?

A No, it does not, not to that extent. A few days after the first meeting Mr. Krieger and Snider met again, and Mr. Snider informed me on the phone before I came down that he wanted records of any bonds and properties, and so forth, and my personal belongings, outside of my clothing.

Q In other words, your fixed assets?

A That's right.

Q He wanted any stocks, bonds, real estate, and things of that nature?

A That's right. I brought those along and gave them to him. That's all there was to that meeting.

Q That is just those particular records that you brought on that occasion, is that right?

A That's right.

Q . And nothing else?

A Nothing else.

Q And did you then meet with Mr. Snider and Mr. Krieger in Mr. Snider's office?

[171] A I met -- that's the second time I met; that's right.

Q What was the nature of the discussion at that time?

A That was all. He just asked me -- he took down the numbers of the bonds I had and also I told him what property I owned and he asked me about some loans I had made, and the ones that were still owing, and-soforth, like that, and any transactions I had with other doctors or any other people where loans had been made, and I gave him all of that information, and I wasn t there very long, just a few minutes, and that's all he wanted of me at that time.

Q Was there any discussion in your presence between Mr. Krieger and Mr. Snider of any thing other than gathering information?

A Well, they talked occasionally, -- that is, Mr. Snider talked to him and asked him how long --

THE COURT: Will you please raise your voice?

A (Continuing) Occasionally, they would speak of a time that the case would be settled, something of that sort; that is, how long it would take to get this information together to settle the case. That's about all.

Q That's Mr. Krieger you are talking about now?

A Mr. Krieger and Mr. Snider.

Q Now, when is the next time that you met with anyone connected

with the Internal Revenue?

A Well, as I recall, I can't state that with certainty, the next time was with Mr. Sullivan, Mr. Krieger and Mr. Snider.

[172] Q Approximately when was that?

A Well, that would have been before they went to the hospital to check the records, because that was --

Q I would like to have you place that date, if you could.

A I can't do it definitely.

Q When is your information that any of the boys from the Internal Revenue went out to the hospital to check your records?

A Well, I introduced them to the Superintendent of the hospital. They asked me to, and I did.

Q When was that?

A It was sometime before those books were turned over, but I can't tell you exactly.

Q What did you tell the Superintendent of the hospital in the presence of the Special Agents?

A I didn't tell him anything. I just introduced them and they told him what they wanted themselves.

Q Now, this is all before you turned over your blue books, is that right?

A That's right.

Q Then you were aware that the Special Agents, the Internal Revenue Agents were interested in the examination of the hospital records with respect to you yourself, is that right?

MR. WALTER: I'll object to the form of the question. He has not laid a foundation for this question. He is now asking the Doctor what he knew, what the designation was.

[173] THE COURT: What was the question?

MR. KAESS: I'll withdraw it and start all over again.

THE COURT: Well, we will take a recess at this time. It is eleven o'clock. Fifteen minute recess.

(Recess)

THE COURT: You may proceed.

Q (By Mr. Kaess) Just prior to the recess I believe you concluded with the proposition that you had introduced Mr. Sullivan and Mr. Krieger to the Superintendent at the hospital?

A That's right.

Q And that that introduction occurred prior to the turning over of the blue books, is that right?

A It did.

Q Now, isn't it true that the occasion for you introducing the Agents to the Superintendent of the hospital was for the reason that the Agents have constantly been hounding you for more books and records?

A That is not true.

Q Isn't it true that they advised you at the time of their visits, and this is prior to the time of the introduction to the Superintendent, that they advised you that because of the lack of any records with respect to surigical operations, that they had to circularize your patients?

A No.

[174] Q What was the reason that you introduced them to the Superintendent?

A They merely asked if they could go to the hospital and see the records, and I said they could.

Q Did your records at the clinic include all of the surgical operations that you had performed?

MR. WALTER: Object. Again, I think we are going into other things than are necessary in this particular lawsuit.

THE COURT: Doesn't that come against the proposition that the Court announced that nothing connecting this Petitioner with the criminal case pending in this court will be allowed?

MR. KAESS: It ties in in this respect, that this witness has now just testified that he didn't refer the Agents to the hospital because of the failure of his own books.

THE COURT: It's a question of veracity?

MR. KAESS: That's right. Thank you.

THE COURT: For that purpose only, it may be asked.

MR. WALTER: Well, the nature of the question has nothing to do with veracity, your Honor. He is going to the very merits of the criminal case. He is asking whether the hospital records contained all of the records of the surgeries. That is what he is asking him. It has nothing to do with this matter. The records we are talking about are two blue books that we are asking suppression of, and the other matters [175] are in the criminal action.

MR. KAESS: He also testified that his records at the

clinic did include surgical operations.

MR. WALTER: Your Honor, --

THE COURT: Well, in view of the ruling that the Court made, and what the Court understands to be the law, such testimony concerning matters of that nature which would connect the defendant with the crime he is charged with in the criminal case is not admissible in a proceeding of this nature.

I remember several years ago we had the Lombardo case here and we had the same situation and counsel were very scrupulous about not touching upon any of the activities of the defendant in the criminal case, but confined themselves to the question of the law of suppression and return.

Q (By Mr. Kaess) To refresh your recollection, you testified that Krieger did ask you for all of your records when he visited you at the clinic on Gratiot?

A That's right.

Q And he asked you for all of your records, did he not?

A He did not. He asked me for all of my records at 11025 Gratiot, and that's what I gave him.

Q You knew he was there examining or making a determination as to your returns for '46 and '47, right?

MR. WALTER: Objection, your Honor. We have gone through all of the reasons why the Agents came there. There is no question about the fact that he was there to investigate his tax returns

[176] MR. KAESS: Well, why does this witness say just --

whatever this address is on Gratiot -- you don't make a return on one address and not on another. It is absolutely absurd and this witness knows it. He's over twenty-one. He's a doctor.

MR. WALTER: Now just a moment, Mr. Kaess. The law is clear as to what a taxpayer's rights are. I won't debate that whole argument here. We are here for the simple question on the petition to suppress two pieces of evidence.

MR. KAESS: And we are here to determine if the allegations here made by yourself or by your client in the affidavit is true.

It is the contention of the Government that it is not true. Let us not kid ourselves.

MR. WALTER: Well, let's go into the matters in the affidavit.

MR. KAESS: We will, but we are entitled to go and determine the surrounding circumstances upon which those affidavits were made, and why, and the purposes for which they were made, are we not?

MR. WALTER: Your Honor, --

THE COURT: If the question relates or is within the purview of any statement made in the petition for suppression or affidavit in [177] support of the petition, it would seem to the Court that it would be a material matter for the Court to rule upon in this case.

MR. WALTER: Then we are way beyond the petition to suppress and the affidavit submitted here.

MR. KAESS: We went way beyond the petition to suppress when we got into the other issue.

THE COURT: I am not trying the criminal case here. But there may arise situations where matters interrogated of the witness, or interrogatories or questions put to the witness may be perhaps close to the matters which are or will be involved in the criminal case, if it is tried.

As I stated, if those same matters are made the issue or issues in the pleadings of this case, it would appear to the Court that, for the purpose of testing the veracity of the Petitioner, they may be asked of the witness.

MR. WALTER: Your Honor, may I just --

THE COURT: Unless you have law to show to the Court to the contrary.

MR. KAESS: Otherwise, all that we would be here for would be to offer the affidavit and rest, if we cannot argue about the merits of the affidavit.

THE COURT: The Court of Appeals said on the first appeal that that was not sufficient for the Court of Appeals to pass upon. That is what the parties did in the original hearing. They argued the [178] contents of the petition and affidavit filed and the Court of Appeals said it was not sufficient, that the heart of the matter was not reached, and specifically stated that when the matter is re-heard the Court should see to it that the heart of the matter is reached, and that is what the Court is attempting to do at this time.

MR. KAESS: Sometime along the line I might go too far, and I respectfully ask the Court to stop me, because sometime you can,

without thinking, --

THE COURT: Well, I think counsel understand the situation that confronts the Court and counsel as well is one of delicacy in this respect, that the Court should not make it appear that it is receiving testimony for or against the Petitioner in this case, the defendant in the criminal case, which rightfully belongs in the criminal court which will try this defendant and not on a petition which, although it has all of the earmarks of being brought under Criminal Rule 41, has not been brought under Criminal Rule 41, since there was no criminal case pending at the time this Petition was filed, but was brought in equity.

MR. WALTER: That's right.

THE COURT: And this Court followed a line of opinions which so found. But, of course, this Court is bound by the ruling of our own Court of Appeals, and our Court of Appeals said, if I understand the opinion, that there was not a sufficient showing that the petition and any [179] affidavits filed were not enough to make an issue.

Now, if that was true, the Court understood it would take some testimony of those who are interested in this whole transaction at the time to testify on the matters both in a criminal case and also in this case, which is not a criminal case.

This is a petition filed under the Civil Rules and not under the Criminal Rules and is, as the Court construed before this, a petition in equity, of which any number could be found in the books.

And, without discussing the cases which are in the books and which are quite similar to the situation presented to the Court in this

case, the Court's understanding is that the Court must have something more substantial than a mere petition, the mere dead word of persons interested in the case, so-to-speak, on paper, and listen to oral testimony and then decide upon all of the testimony, exhibits, and so on, whether or not the petition filed by Dr. Biggs should be allowed and the suppression of the two books follow the order of the Court to that effect, or whether the petition, on the basis of all of the evidence, should be dismissed.

So we have, as I say, a delicate situation that is not cut-and-dried, so far as the rulings that are made by the courts, but the Court wants counsel to understand that while we cannot bring out anything [180] of a criminal nature here, as such, since that belongs in the criminal case, there may be elements of evidence which touch upon that and which it would be very difficult for the Court not to recognize.

Now, then, what is the question?

MR. KAESS: The question I put is whether or not Agent Krieger had asked for all of the books at the time of his conference with Dr. Biggs at his clinic on Gratiot Avenue, and I think that'a a rough reappraisal of the question asked.

MR. WALTER: And I think the answer previously made was that he asked for the books at that location and he turned over to him everything that was there. That was his answer previously made. Now he is going into it a second time.

MR. KAESS. Well, let's straighten it out. It's perfectly all right.

THE COURT: Well, the Court does not know. The matter

in issue here is the suppression of the two books, and that's all. Isn't that true?

MR. KAESS: That's right.

THE COURT: What is the benefit of the Court's going into any other matters at this time? Any other books or any other papers?

MR. KAESS: But the issue is not the suppression of the books alone, as I see it, your Honor. It is the question that the books are to be suppressed by reason of this claimed immunity that was granted [181] to this defendant by, allegedly, Giles Kavanagh, and we want to lead up to the circumstances by our profert of proof or our cross examination. We'll turn to the situation leading up to the offer of the books by Dr. Biggs.

THE COURT: Mr. District Attorney, the Court sympathizes with you and with the other counsel in all of your efforts to bring this case to a conclusion and bring out such facts as each of you feels should come out or should be withheld, but the petition requests the suppression of these two books which I understand to be ordinary Lawyers Handy Books used in this case by a doctor, and that is all that is involved in this case. No other evidence is involved in this case, and the Court is not interested in this case what else there may be in the criminal case.

I think you will recognize that.

MR. KAESS: Yes, I do. But our proof with respect, which I openly profert right now, is in respect to the proof on this item, that these books of Dr. Biggs were turned over to the Government, the Internal Revenue Agent, and the Special Agent, only by reason of the fact

that the Agents were out at the hospital and beginning to get the information to circularize his clients. Now, that is the basis upon which the Government contends that those books were turned over, and voluntarily by reason of that concern that they were turned over to the Government.

[182] THE COURT: Well, there isn't any question about the fact that they were turned over to the Government.

MR. KAESS: That's right.

THE COURT: Well, now, one of the questions in the case would be whether they were turned over willingly and not by trick and fraud, and that is what I think the Petitioner in this case contends, that such was the case, that they led him to believe that there was no prosecution to follow if he did turn over certain records.

I don't recall whether the record so far shows that those records consisted of those two books; whether that was all he was to turn over, and he would get immunity from criminal prosecution.

MR. KAESS: You have hit it right on the head, your Honor, I think.

MR. WAITER: We may state now that the only two books in issue and covered by this petition are the two blue books, one for '46 and one for '47. Those are the only two books, and those were the only books turned over on February 24th, 1949. That is the sole issue here.

THE COURT: Well, that's all the Court knows about up to this point. The testimony is concerning these two books.

Now, then, all the Court is interested in is how these books came into the possession of the Government, whether they came into the

[183] possession of the Government as the Petitioner insists they did, or in some other way. I don't know.

MR. KAESS: We will try to restrict our testimony to that which the Court has outlined.

THE COURT: I think if counsel will confine themselves to that issue, I think that that will --

MR. KAESS: We have tried to. I am satisfied that the questions we put are only within that narrow issue because they lead up to the actual production of those books voluntarily, as we contend, by Dr. Biggs to Agent Krieger or Sullivan.

THE COURT: I still can't see how the contents of these books are material to the issue before the court. I don't know how many pages there are. Once the Court opens the door just a little you may try to open it wide open and of course the Court is not interested in that in this kind of proceeding. All the Court is interested in is the manner in which these books found themselves in the Government's possession, in the Treasury's possession.

MR. KAESS: Well, we are only interested in who had these books and why weren't they turned over to the Government before.

MR. WALTER: That's not the issue.

THE COURT: Well, if you will confine yourselves to those things, I think we will go ahead.

[184] MR. KAESS: All right.

Q (By Mr. Kaess) Getting back to this old question I would like to have answered, and then we will proceed. Mr. Krieger up until the

time we have been discussing was the only -- and now Mr. Sullivan -- were the only two men from the Internal Revenue with whom you have spoken prior to your introduction of them to your Superintendent, is that right, at the hospital?

A They were the only two.

Q You had not seen Giles Kavanagh yet?

A May I qualify that answer?

Q Yes.

A All right, I'm going to start right in and I'm going to go over this whole thing.

Q No, you answer the questions as I put them.

A I asked you if I could qualify it and you said Yes.

Q You can qualify that answer.

A I've seen Giles Kavanagh on three different occasions: once at a luncheon, once before those books were turned over and once after.

Q Now, the question as put to you was: Had you seen Giles Kavanagh before that? That's all I asked you.

MR. WALTER: Before what?

A I've seen Giles Kavanagh before what?

Q (By Mr. Kaess) Before you had introduced to your Superintendent Krieger and Sullivan?

[185] A Of course I have.

Q You have?

A Yes.

Q All right. Now did you discuss at this first luncheon appoint-

ment with Giles Kavanagh -- always remember the sequence of the events I am asking you, because I asked you before had there been anyone in the Internal Revenue that you discussed this with, and you said No. Now, remember the sequence. I want to warn you about these things because sometimes they can bounce back at you. I don't mean to cross you up. Please bear that in mind.

When you had your first luncheon appointment with Kavanagh and -- it was with Kavanagh and Mr. Snider, was it not?

A That's right.

Q Did you advise Mr. Kavanagh of the magnitude of your case?

A I didn't know anything about the magnitude of my case.

Q So you didn't know and Giles Kavanagh didn't know, isn't that right?

MR. WALTER: Object.

MR. KAESS: If you know.

A I refuse to answer. I stand on my Constitutional rights.

Q (By Mr. Kaess) All right, at least you never advised him of the magnitude of your case or with respect to any facts of your case, is that right?

MR. WALTER: Your Honor, again we are going into ele-

[186] ments that go to the essence of the criminal case.

THE COURT. I think, Mr. Walter, this goes to the very heart of the matter that the Court discussed at some length and I think that the Court would be interested in hearing that.

Q (By Mr. Kaess) Then you did not discuss with Giles Kavanagh

the magnitude, is the word I used, of your case?

A I discussed my case.

Q Well, that is nebulous, when you say you discussed your case. Did you describe it that you were in trouble with the Internal Revenue? Is that what you told him?

A No, I just told him I had received a letter from them asking to check those years.

Q Yes. And on the subsequent visit or luncheon, whichever it was, with Giles Kavanagh, did you discuss anything further than that?

A All I discussed with him on my second visit was that I wanted an assurance that if -- no, I didn't. The second visit I just talked to him and he asked me were there any books that I had that I could turn over to help the Government qualify my tax, and I told him I would search and find out and if I had any I would turn them over.

Q And did you?

A Yes.

Q Where did you search?

[187] A Well, any place that we kept our books.

Q And where were those any places that you could search?

A In our offices.

Q You are using the word "offices" plural. What do you mean by "offices"?

A Well, our office on Gratiot Avenue.

Q Any place else?

A No, I didn't keep it any place else. The secretary at the

hospital kept those two blue books.

Q And were those two blue books ever in your possession?

A Yes, they were.

Q When?

A Well, at the end of each year when the work was done.

Q What would she do?

A Just turn the book over to me.

Q For what purpose?

A For the record.

MR. WALTER: Again, your Honor, I object to the going away from the Giles Kavanagh conversation and we are back again to these books, as to who kept them, and so on. I again say we are going into things not germane to the issue.

MR. KAESS: I will withdraw the question.

Q (By Mr. Kaess) From whom did you get the books when you turned them over to the Agents?

[188] THE COURT: Just a minute, there is an objection.

MR. WALTER: He withdrew the question, your Honor.

MR. KAESS: I withdrew the question, your Honor.

May the witness answer, your Honor?

THE COURT: He may answer that question.

A The books were kept at the hospital.

Q (By Mr. Kaess) By whom?

A My secretary.

Q Did you supply them to her?

A She supplied them to me under my advice to get them.

Q When was that?

A When she began to work for me.

Q When did she begin to work for you?

MR. WALTER: I object again, your Honor?

What is the relevancy of these questions to the matter at issue? The issue here is: Were the conversations held with Giles Kavanagh? Was there an inducement to turn over these records solely for civil determination? That is the issue here.

THE COURT: Well, we can broaden that issue a little bit by finding out all of the circumstances concerning the locus of the books, the keeping of the books, whose possession they were in.

MR. WALTER: Your Honor, he has testified that at the time he talked with Mr. Kavanagh that the books were in his possession.

[189] MR. KAESS: I'm entitled to cross examine him right on that point, am I not?

MR. WALTER: Well, I think he hasn't any right to go into any of this and I'm objecting to it.

MR. KAESS: You asked for it.

MR. WALTER: I didn't ask for it.

MR. KAESS: You just got through making the statement that he stated he was in possession.

THE COURT: The Court rules he may answer the question.

Q (By Mr. Kaess) Let's keep on that subject for a moment. You say you had possession of those blue books immediately before turning

them over?

A Those books were not in anyone's possession. They were laying on my desk in the hospital. Anyone could possess those books. I didn't have possession of those books, neither did the secretary.

Q Where did you get them from when you turned them over to --

A I got them out of the desk over at the hospital.

Q Did you talk to your secretary before you picked them up?

A No, I just went there and picked them up.

Q How long have they been kept there?

A Ever since they were kept record of.

Q As a matter of fact, were they your books or were they Fay Horton's books? That's your secretary's name.

MR. WALTER: Object again, your Honor. This is again [190] going into elements of the case which are not raised here.

THE COURT: Mr. Walter, this is a very important question, in the Court's opinion.

MR. WALTER: May I confer with counsel just a second?

(Counsel for Petitioner confer.)

MR. WALTER: We will note an exception.

MR. KAESS: Exception for what reason?

MR. WALTER: Well, I believe it is going beyond the purview of the case and you are now going into his own constitutional rights in this matter, your Honor. I think this is a part of the criminal case.

MR. KAESS: This is the very issue upon which we are here, your Honor, I feel.

THE COURT: Right now it is a question from whose possession were these books taken and by whom delivered. The last thing that this witness said was that they were lying around in the hospital.

MR. KAESS: "They were in no one's possession", is the phrase he used. I asked him the next question, "How did you get them?"

THE COURT: Well, that is a matter the Court wants to know about.

MR. WALTER: If it is simply that, I have no objection.

Q (By Mr. Kaess) All right, the question put to you is: How did [191] you get them?

A Just picked them out of the desk, picked them up.

Q How did they get there in the first place?

MR. WALTER: I object, your Honor.

THE COURT: It may be answered.

MR. WALTER: Exception.

Q (By Mr. Kaess) If you know.

A They were supplied to me. I asked Mrs. Horton to get a book to keep a record of the work and that is how they happened to be there.

Q How did that come about?

MR. WALTER: Object, your Honor.

Q (By Mr. Kaess) Isn't it true that some time prior to the time that she began keeping these blue books that there was some discussion with you and Fay Horton with respect to --

MR. WALTER: Your Honor, --

MR. KAESS: You mind if I finish the question?

MR. WALTER: Just a minute. I'll object to going into this situation. The only question is how the books got into his possession before they were turned over. Now it is enlarging other issues.

THE COURT: All right, your objection is on the record.

Q (By Mr. Kaess) Did you supply those Lawyers Books to her personally?

[192] A I feel that this is in the criminal aspects of the case; and, after hearing your Honor talk, I refuse to discuss these books any further than that they were turned over to the Government and that I had the assurance that if these books were turned over that they would be used in determining my tax liability, if I had any.

I stand on my Constitutional rights and I refuse to discuss these books any further.

Q (By Mr. Kaess) Well, whose books were they, yours or Fay Horton's?

A I've given you the answer and that's it.

Q You are relying on the same --

THE COURT: Dr. Biggs, the Court orders you to answer that question

A These books were purchased by --

Q (By Mr. Kaess) Just a minute. Are you answering that question?

MR. WALTER: Just a minute. This is under the order of the Court, I understand, that he is answering that question.

A These books were given to Mrs. Horton or purchased by her, I

believe, or her husband, and under my direction to get a type of book to keep a record and that's why that type of book was used. Her husband, I believe, had these books and they have used them in his work or sold them. I don't know. But that is how the books were obtained.

Q But then you got them. When you got them to turn them over [193] to the Revenue Agents, you went to her desk and picked them out, is that it?

A It was not her desk, it was a desk at the hospital.

Q A desk at the hospital, and brought them down to Mr. Snider's office where you were having this meeting?

A I may have picked them up some few days before. I can't say that very day. I may have picked them up some few days before.

Q Were you aware that they were there?

A Yes, I was aware, somewhere in that area, anyway.

Q Now getting back to your meeting with Giles Kavanagh. In your discussion with him on your first visit you discussed only the fact that you had received a letter from Internal Revenue, signed by Mr Krieger. On the second visit you discussed what, again? Give me it all.

A We discussed more than that on the first visit. I told you we discussed his health, we discussed mutual friends and we discussed the tax case up until that level.

Q You discussed the tax case. Now, what do you mean by that?

A Well, the fact that I had had a letter from the Internal Revenue Department.

Q That's what you mean by "discussed"?

A And we discussed the fact that I might owe tax.

Q What?

A That I might owe tax. I didn't know for sure.

Q That's what you told him?

[194] A That's right.

Q Did you tell him anything else with respect to the tax situation as it affected you personally?

A No, no.

Q All right, that's the first visit. Was there anything else with respect to this tax case that you discussed with Giles Kavanagh on this first visit that you can recall?

A Mr. Snider handled that matter. He is the attorney.

Q In your presence, did Mr. Snider discuss anything further on that first visit?

A No, I can't say that he did except that he -- in our conversation with Mr. Kavanagh told him my case, as he understood it, was not one of a criminal liability. It was a tax case of a civil liability and that it would be settled.

Q Now, this is what Mr. Kavanagh told Mr. Snider on the first visit?

A Well, that's what he told me and Mr. Snider had been told the same before that.

Q This was told to you in your presence at the first luncheon?

A That he felt. He didn't say it would be.

Q Let's get it straight. It's important. He said he felt it might

be?

A That's right.

Q In other words, he didn't give you any assurance that this was a civil case at that time, did he?

[195] MR. WALTER: Objection. He has stated it. His conversation is on the record, your Honor, and it now calls for a conclusion.

THE COURT: Mr Walter, attorneys in this court always stand when they address the Court.

MR. WALTER: Pardon me, your Honor.

MR. KAESS: Would you repeat the question?

(The last question was thereupon repeated by the reporter as follows:

"Q. In other words, he didn't give you any assurance that this was a civil case at that time, did he?")

MR. WALTER: May that question be withdrawn and restated, please?

MR. KAESS: I don't withdraw it.

All right, I will withdraw it and re-phrase it.

Q (By Mr. Kaess) At the time of the first luncheon meeting with you present Mr. Kavanagh gave neither you nor Mr. Snider any assurance that this was a civil case only?

A Yes, he did.

Q At the first luncheon meeting?

A At the first time, the very first meeting, he told me this: "If you owe any tax you will have to pay the tax plus penalty," and that's all.

Q He said "If you owe a tax and you have not paid it, you are going to pay it plus penalty," is that it?

[196] A That's right, and "that's all". Add that to it.

Q All right, just a moment. But before you said he said he felt that it was only a civil case.

A That's what he said. He said "All you'll have to do is pay your tax plus penalty, and that's all."

Q That's right. That's all any taxpayer has to do, isn't it, pay his tax if he is late and pay his penalty?

A Well, I'm not here to answer that question, I don't believe.

Q Is that the way you understand it? Do you understand that you're supposed to pay your taxes?

MR. WALTER: Objection, your Honor. Again I think we are going afield from this hearing.

THE COURT: The Court will sustain the objection.

Q (By Mr. Kaess) Now, is there anything else? Every time I ask a question you are adding something further. Was there anything else at this first time now?

A Not that I can recall.

Q You next met with Giles Kavanagh, you testified, at a second luncheon. Did you meet with Mr. Giles Kavanagh at any time in between that first luncheon and that second luncheon?

A I didn't meet with Mr. Kavanagh at the second luncheon. I did not testify to that.

Q I'm asking you, did you?

A I didn't meet Mr. Kavanagh at a second luncheon.

Q Who was the second luncheon with?

[197] A I didn't have a second luncheon.

Q I'm sorry. When did you next meet with Mr. Kavanagh?

A With Mr. Kavanagh, about two weeks before February 24th.

Q That would be about the 10th of February?

A Somewhere thereabouts.

Q And where did you meet him?

A At his office.

Q Were you with anyone?

A No.

Q Was Mr. Kavanagh with anyone?

A No.

Q Mr. Snider was still your attorney?

A That's right.

Q Why wasn't he with you?

MR. WALTER: I object, your Honor. Is that pertinent to this issue?

THE COURT: The objection is sustained.

Q (By Mr. Kaess) How did you happen to meet with Mr. Kavanagh?

A I met him through being introduced to him by Mr. Snider.

Q Did you just walk into Mr. Kavanagh's office around February 10th?

A I met him at the place of luncheon.

Q You met him at the Wayne Club?

A I believe that's where it was.

Q At the second occasion?

[198] A The first occasion. I never met him anywhere except at his office the second time.

Q We are talking about the second occasion that you met Giles Kavanagh. Where did you meet him?

A I met him at his office.

Q How did you happen to go to see him?

A I called him up and made an appointment to see him.

Q You made an appointment?

A Right.

Q And went down to see him?

A Yes.

Q At what time?

A As I recall, it was around two o'clock in the afternoon.

Q And the two of you were alone?

A That's right.

Q Now, as I recall your testimony, you said that prior to this occasion now, that you are meeting with Mr. Kavanagh, at about February 10th, you had already introduced Agents Krieger and Sullivan to the Superintendent of the hospital, right?

A Well, I don't know the exact time, but I introduced him before I turned those books over, that's what I said.

Q On the occasion of the second visit with Mr. Kavanagh, -- will you listen to my question, -- as of that date, had you already introduced

Agents Krieger and Sullivan to the Superintendent of your hospital?

[199] A I can't say that.

Q Why can't you?

A Because I can't recall the time I introduced them definitely.

Q Would their recollection be better than yours?

A Might be.

MR. WALTER: Objection, your Honor. How can the witness answer that?

THE COURT: Objection is sustained.

Q (By Mr. Kaess) I believe you testified earlier in this cross examination that you introduced the agents to your Superintendent prior to the turning over of the papers, is that right?

MR. WALTER: Books.

MR. KAESS: The books.

A That's right.

Q (By Mr. Kaess) But you cannot recall as to whether or not the introduction to the Superintendent of the agents was prior to your second meeting in Mr. Kavanagh's office in the building?

A No, I can't.

Q Now, do you recall the sequence, if you had met Mr. Sullivan prior to the time of the second meeting, Special Agent Sullivan?

A No, because I only met him one time up to that time. I met him the day that we -- that is, that he asked me to introduce him at the hospital. That is the only time that I have met him up to that time. As [200] I have stated, I don't know whether that was before or after the time

I saw Mr. Kavanagh.

Q Did Mr. Sullivan ever indicate anything to you with respect to granting you immunity?

A Mr. Sullivan, no.

Q Mr. Krieger?

A Immunity was not talked about with either one of these gentlemen in my presence.

Q By "immunity", do you understand what I mean?

A Yes, I do.

Q Yes. What?

A To grant me the right of not using any of my records to prosecute me, or immunity, if there were such records, to be used against me.

Q No one was promising you --

MR. WALTER: Object now.

A It doesn't make any difference.

MR. WALTER: I'll object to the whole question of immunity. That is something the Court will construe. He is now arguing with the witness about the meaning of immunity.

THE COURT: That again is one of those things that is so involved with all of those goings and comings that it is extremely difficult to disassociate it from the other activities that were in progress at the time, and I think because of that the Court will let it stand.

[201] Q (By Mr. Kaess) Did Agent Sullivan ever tell you that there would be no criminal prosecution?

A We did not discuss criminal prosecution.

Q How about Agent Sullivan?

A He didn't discuss criminal prosecution with me at no time.

Q Then why did you sign this affidavit that said that Agent Sullivan did?

A I didn't sign that. That affidavit is wrong.

Q Oh, it's wrong?

A Absolutely.

Q Why did you sign it?

A Well, let me see that again. (Receiving document from Mr. Kaess.)

MR. KAESS: I herewith hand the witness the affidavit of Dr. Biggs.

THE COURT: Whose affidavit is that?

Q (By Mr. Kaess) Whose affidavit is that, Doctor?

A This is an affidavit which Mr. Cashen prepared himself.

Q Is your signature on there?

A It is.

Q Was it notarized and sworn to?

A It is. That is not the statement that I gave Mr. Platt and Mr. Doyle at no time, this information here. I sent the information to the Government in this affidavit here, and the Agents know that themselves, [202] that this affidavit is absolutely one hundred per cent wrong, and I did not turn these books over of my own free will, and they know that themselves.

Q Does that affidavit say you turned them over of your own free will?

A That's what it says, and it's not true. Mr. Cashen explained it yesterday. He said that he took the full responsibility to turn over those books.

Q You'd better read that affidavit.

A I've read this affidavit.

Q Then you had better read it again.

A I would like to have plenty of time to read this over, your Honor.

THE COURT: Well, witness, when you testified that the affidavit is one hundred per cent wrong, an affidavit that has been submitted to this Court with the intention, no doubt, to have the Court believe the statements in the affidavit, it would seem to the Court that you ought to give it your fullest scrutiny now and see whether you want to change your testimony that the affidavit is one hundred per cent wrong.

(Short intermission while the witness reads affidavit.)

THE WITNESS: I am ready to discuss this affidavit, your Honor.

THE COURT: Mr. Kaess, I think the witness has made a statement here that he may repeat now.

[203] THE WITNESS: I am ready to discuss this affidavit and I want to take it part for part. There are some --

MR. KAESS: You can take that up with your own counsel.

I'll ask you the questions and you can give the answers.

THE WITNESS: All right.

Q (By Mr. Kaess) Is that affidavit true?

A Part of it is true and part of it isn't.

Q Is the part in there about Agent Sullivan true?

A I was not introduced to Mr. Sullivan as of the Intelligence Unit by Mr. Krieger.

Q Yes, or no?

A No, it wasn't.

Q Is the part in there about Agent Sullivan true?

A There are two or three parts about Agent Sullivan.

Q Is any part?

A I'll go over it part by part.

Q All right, just yes or no.

A The second paragraph, no for the second one. The first paragraph, yes. The second paragraph, no.

Was I introduced to Mr. Sullivan as from the Intelligence Department, or Mr. Krieger? Neither.

Mr. Krieger did not telephone me at any time with regard to reprimanding me in regard to turning over any records.

Mr. Sullivan called me one time and that was way down just before he entered the case. The only time I recall him calling me on the [204] telephone, he wanted to know if I could search further to find any records. He never at any time called me up other than that.

Q (By Mr. Kaess) Did you ever talk to him at any other time

than that?

A No, sir, I never talked to him at any other time than that. He came to the hospital and I spoke to him one day out in the hall as he was going to the library.

Q That was just a casual visit?

A That was just a casual visit.

There was no time at any time a discussion how Mr. Sullivan could get such books.

Those books were never discussed with Mr. Sullivan or Mr. Krieger at any time except the time when they were turned in in Mr. Snider's office.

I never discussed the matter thoroughly with Agent Sullivan.

Mr. Sullivan, at the time he received the books, did state he felt that the matter could be cleared up within thirty days at that time.

I never talked to Mr. McFarlane in my life. I never met Mr McFarlane

It is true that I did not turn over my books of my own free will, only that I was assured that these books would not be used against me for criminal prosecution.

[205] Q Didn't Agent Sullivan ever tell you that?

A Never discussed it with Mr. Sullivan.

I had the assurance of Mr. Giles Kavanagh, whom I fully one hundred per cent believed was head of all taxes in Detroit and the State of Michigan I thought all cases were settled with him. I didn't know anything about Mr. Sullivan or that he even existed

Mr. Sullivan never did inform me that this tax matter was of a criminal nature.

Q What's that?

A It says here:

"Deponent further says, that because said Agent Sullivan informed him that the investigation of his income tax returns were not of a criminal nature" --

He never informed me of that. He never talked to me about that.

That's it.

Q Well, substantially, the whole thing is untrue; isn't that about right?

A That's right.

Q Why did you sign it?

A I don't know how this piece of paper was ever signed. I never read this before thoroughly until today. This is not a record -- only parts of these that have any truth in them is what I said.

Q Those questions and answers which you have just now given [206] with respect to the affidavit is the affidavit marked Government's Exhibit 3, is that right?

A That's right.

Q I now hand you Government's Exhibit 4 and will you tell me whether that affidavit signed by yourself is true?

A I would like to be able to read this thoroughly the same as I did the other, your Honor.

(Short intermission while witness reads affidavit.)

A (Continued) I would say that that affidavit is ninety-nine per cent right. There is a little difference there, too, in one or two things I want to explain.

Q You are referring to Government's Exhibit 4 which you have just completed reading?

A Yes, sir.

Q And that is signed by yourself?

A That's right.

Q And that is a photostat?

A That's right.

Q What is the date of that? Would you refer to that?

A May 26, 1953.

Q I refer you back to Government's Exhibit 3, the first affidavit you read. What is the date of that?

A October 1, 1951.

Q And is that your signature on Government's Exhibit 3?

[207] THE COURT: What is the date of that?

MR. KAESS: The first affidavit is dated the 3rd day of February, 1950, and the second affidavit, Government's Exhibit 4, is dated February 27th, 1951.

Q (By Mr. Kaess) You mention "ninety-nine per cent". That leaves one per cent. Where is that one per cent?

A Well, Mr. Snider's brother may have been along at that meeting,

but I didn't recall that he was. That is one.

It says in here that he was.

And, secondly, I don't recall Mr. Sullivan at any time telling me that by turning over those records that that would entirely eliminate any criminal aspects of the case, because we didn't talk of that, but he did do this: All along I felt that from his attitude and things that he said I felt definitely that my case was not one of criminal prosecution.

Q You say "from the way he acted and from the things he said." Can you name any things or times or occasions, and what he did say that gave you that impression?

A Yes, I can.

Q All right.

A In the first place, he told me, the day I gave him the books, and --

Q You are referring to these blue books that are in issue?

A Yes. The day I gave him the books he felt that the case would be completely wound up in thirty days. He didn't say that his investigation [208] would be settled in thirty days. He said that the case would be completely wound up and ready for settlement in thirty days. I asked him point-blank those questions.

Q Those questions?

A I asked him how long did he tnink it would take for my case to be settled, and he said "about thirty days".

Secondly, --

Q That was when you turned over the blue books in Mr. Snider's

office?

A Yes. And he also stated along the latter part that he was on the case, he stated this to me, -- I wouldn't know about it, naturally, this one issue: He said he was going to get married and he would like to have any additional records that he could get. That's when he talked to me about it on the telephone. And that if he could get any additional records he thought probably the case would be wound up right away and then he would like to get away, that he was going to get married. And I told him I didn't have any additional records.

Q But to sum it all up, there was never anything said by reason of anything you said or any conversation with Mr. Sullivan, -- did Mr. Sullivan ever say to you that there would be no criminal prosecution?

A He never stated that in so many words, but Mr. Kavanagh definitely told me --

Q I'm talking about Agent Sullivan.

[209] A I'll have to explain it this way to get it in, and you want to know it all. That's what I've been told. He did state that he had talked to Mr. Sullivan about my case, and I fully believe that he did, I mean, from the words, and what he had to say, and what he said back to me, and what Mr. Sullivan had said to him.

Q What was the occasion of that?

A That was the last time I saw him.

Q Was it before or after you turned over the blue books?

A That was after the books were turned over.

Q So that they were turned over irrespective of that conversation?

A And from the conversation I gathered that they probably knew all about those books being turned over. There is no question in my mind about it, and how they were turned over --

Q Who is "they"?

A Both agents.

Q Who was "they" when you say "they"?

A Mr. Krieger and Mr. Sullivan. I'm certain in my own mind that they knew all about them.

Q They knew all about what?

A They knew all about these books; that I had been told, been assured by Mr. Giles Kavanagh that if I turned those books in that they would not be held against me for criminal prosecution. There is not any doubt in my mind at all that both of them knew about it.

[210] Q Prior to the time of the turning over of the books?

A They knew at the time the books were turned over. People reflect certain countenances and certain attitudes. Being a physician myself, you can't always hold those off of your face, and I made a study of both of these men when I turned these books over that day and I'm satisfied by looking them over that they both knew about it.

Q All right. Which affidavit you have been testifying to is more correct, the latest or the earliest?

A There is only one that is correct. The other one has nothing in it at all. That affidavit before probably was made on a piece of paper that had my name signed on it and Mr. Cashen told you yesterday that I did not know the contents of that affidavit. It's a matter of record that he told

you that.

Q That isn't what he said at all.

A He did say that.

Q But you would say that that second affidavit which you had signed is more correct than is the first?

A I would say that this is about ninety-nine per cent correct.

Q But even that is false in part?

A It is not false in part, except one thing, that it says in here, -- that it covers exactly what I said, it covers the fact that I thought Mr. Sullivan was aware, -- I'll read it. That's the best way.

THE COURT: The Court will recess now until two o'clock [211] this afternoon. That is, the Court will recess as far as this case is concerned, but the Court has another matter here, a criminal matter, to take care of, if the matter is ready for the Court to be heard.

(Noon recess in this matter.)

- - -

Detroit, Michigan,
Wednesday, October 12, 1955
2 o'clock P. M.

- - -

(COURT CONVENED PURSUANT TO ADJOURNMENT.)

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(PARTIES PRESENT THE SAME AS BEFORE.)

- - -

[212] THE COURT: You may proceed.

DR. RAYMOND A. BIGGS resumed the witness stand and, having been previously duly sworn, testified further as follows:

CROSS EXAMINATION (Continued)

BY MR. KAESS:

Q At the time of the luncheon recess you indicated you wanted a further opportunity to examine the affidavit. Have you done that?

A I think I have checked the two affidavits; yes.

Q Any further comment you wish to make about them?

A The first affidavit which I said for the most part was wrong, I don't have any idea of how that affidavit was signed because it was not read by me, unless -- it was true that I did get to Mr. Cashen's office late in the day because of my crowded schedule daily it was difficult for me to get there before his leaving the office. It could be that he said, and I did [213] believe that he said he had an affidavit he would like me to sign and I went in and signed it, but that information that was in that affidavit was not obtained from me, nor was it the true facts in this case.

Q Now, at the time of the signing of either of the two affidavits, did you know the purpose that was to be made of them?

A Well, the second affidavit was made out by Mr. Doyle and he went over the affidavit with me. In fact, that was essentially what I told him.

Q Were you advised by Mr. Cashen, in respect to the first affidavit, the purpose for which you were signing that first affidavit?

A I don't recall that.

Q And who is Mr. Doyle?

A Mr. Doyle and Mr. Platt were in the same law firm who were on the case and I believe Mr. Doyle handled the case here before on the hearing of this motion previous to this one.

Q Now, bearing in mind the date on which you turned over the blue Lawyers Handy Books to Mr. Krieger, in Mr. Snider's office, I believe that is February 24th, 1949, did you know that Agent Sullivan had been out to the hospital?

A Well, these books were given to Mr. Snider at his office and both of the agents, Mr. Krieger and Mr. Sullivan, --

Q May I refresh your recollection? Are you sure that they were both there?

[214] A You asked me if I gave them to Mr. Krieger.

Q Yes.

A And I'm just explaining I did not give it to either one.

Q You are sure both of them were at the office of Mr. Snider at the time you turned them over?

A Yes, I am; definitely.

Q All right, bearing that date in mind, did you know that either Agent Sullivan or Agent Krieger, or both, had been out to the hospital?

A As I recall, they have been.

Q Did you know that Agent Sullivan or Agent Krieger had talked with Fay Horton at the hospital a few days prior to that time?

A No, I do not, -- did not.

Q Now, you have had several counsel. You started out with Mr. Waldmann, is that right, who was your regular counsel?

A That's right.

Q Who was next your attorney?

A Mr. Snider.

Q Then who?

A Mr. Cashen.

Q Did you consult with any other attorney between that time?

A Friends of mine.

Q Did you consult with any attorneys after Mr. Cashen?

A Yes, I consulted with Mr. Doyle and Mr. Platt.

Q Those were the attorneys that were retained by you through [215] Mr. Cashen?

A That's right.

Q Had you seen any other counsel with respect to your tax matter up until that time?

A Nothing in regard to the tax matter specially. I have seen other counsel, but not in regard to that, as I recall, anyway.

Q You dismissed Mr. Snider at about what time?

A I would say Mr. Snider was dismissed sometime in April or the first of May. I think it was April.

Q Of '49?

A '49.

Q He testified that you were not satisfied with the speed and dispatch with which he was handling the case, is that right?

A That is evident or I would not have dismissed him.

Q Is that right?

A No, I was not satisfied with the way the case was handled; that's right.

Q Did any of that dissatisfaction have to do with the turning over of the blue Handy Book?

A It didn't have anything to do with that at all.

MR. KAESS: That's all.

MR. WALTER: That's all, no questions.

(Witness excused.)

[216] MR. WALTER: Your Honor, I believe that all of the documentary evidence has been introduced as we have gone along and, just for the record, we would like to offer them again so that they are properly introduced, and we would like to rest at this time.

THE COURT: You mean you have all of the papers that you want on file in now?

MR. WALTER: Introduced. That's right, your Honor.

THE COURT: Very well.

MR. WALTER: We have asked the Court to take judicial notice of this record and that I have leave to either obtain a copy for you or a photostat copy of this to submit to you, that is this Congressional Hearing.

THE CCURT: We can take that up at the conclusion of the taking of testimony.

MR. WAI TER: All right.

MR. KAESS: With respect to the motion you just made as to the re-introduction of exhibits, we still wish our objection to stand with respect to the 90-day letter and that which developed.

MR. WALTER: All right.

THE COURT: Is there something undecided by the Court here?

MR. KAESS: No. We want our objection to remain on record.

[217] THE COURT: Oh, you renew your objection. All right.

MR. WALTER: We'll take up this matter, then, at the

conclusion of the case.

THE COURT: All right.

MR. KAESS: May we have a minute?

THE COURT: Yes.

(Short intermission.)

THE COURT: Mr. Walter, those papers you left on the Clerk's desk, did you mean to file them with the Court, with the judge, or just put them in as part of the proofs?

MR. WALTER: They were a part of the proof and they were all introduced as we went along and I just wanted to make a statement for the record.

THE COURT: They all have been introduced?

MR. WALTER: That's right. I just want to save the record so that I'm sure I haven't overlooked any, because they all have been ruled on.

THE COURT: How many papers are there that you filed?

MR. WALTER: Nine different exhibits, with one having two parts.

THE COURT How many did Mr. Kaess have

MR. WALTER: Nine altogether, including his up-to-date.

THE COURT: Very well.

You may proceed, Mr. Kaess.

[218] MR. WOODS: The Government at this time would like to make a motion to dismiss the Petitioner's Motion to Suppress Evidence.

Number one, from the standpoint of the character and

caliber of the evidence as elicited from the Petitioner's witnesses, it is the contention of the Government that they are not worthy of belief, any of them.

Apparently the Petitioner, who took the stand, has had a propensity at least for signing affidavits that were false, and the other witnesses, it is clear, were inconsistent in many of their protestations that there had been a promise of immunity given. We have an affidavit from Mr. Snider who was representing the Defendant at the time that this claimed promise of immunity was given. In the one breath his testimony is unequivocated, and yet from the very tenor of the affidavit itself it does equivocate. He hedges. We don't feel that the caliber of the testimony as has been given by these witnesses for the Petitioner is really worthy of belief by this Court in order to carry on and force the Government to go ahead.

Secondarily, it would appear to the Government that this situation exists: Here we have a Petitioner who in his motion to suppress evidence claims that on the 24th day of February, 1949, he turned over these two Lawyers Handy Books in reliance upon promise of immunity.

During the period of time leading up to the 24th of February, [219] 1949, Norman Snider, who was a witness here, was the attorney for this Petitioner. Dr. Biggs, the Petitioner, for the most part, and for the most important part, received his assurances from this counsel.

Now, then, having received those assurances from his counsel, upon whom he was primarily relying, he then turns over these books and records and now claims that this promise of immunity that was

relayed to him immunized him from criminal prosecution and that these books presently should be suppressed.

The only way I can correlate the situation which we have here is in the cases involving contempt.

The cases are legion, of course, that in contempt cases, where a witness fails to appear in response to a subpoena or subpoena duces tecum either for the purpose of testifying or producing books or records in accordance with such subpoena duces tecum, that if he relies upon the advice of counsel, upon the institution of contempt proceedings for failure to so appear, testify or produce books and records, that such reliance upon the attorney's advice operates as no defense to him. We think the correlary is here to the extent that the advice that Dr. Biggs received from Mr. Snider does not presently operate as a defense, then, to the extent that he considers himself insulated at this point to the point of filing a motion to suppress and making this Court make it stick for him.

[220] I think that is the sum and substance of the basis of our motion at this time, your Honor.

THE COURT: Mr. Walter.

MR. WALTER: Your Honor, there has been no law presented to your Honor in this matter. It merely was a resume of the facts which you heard from the witness stand, with no need for me to belabor the point.

I think that one thing is clear in answer to his statement. Dr. Biggs took the stand and stated himself that he had had the assurances from Mr. Kavanagh personally, face to face, and it was on those personal

assurances that he turned over the books.

The other testimony is corroborative of what occurred, and we believe that if there is any doubt in the matter, there are cases that that doubt is resolved in the favor of him who is claiming his constitutional privileges.

There are two recent decisions on similar matters, the Shotwell case which is in the Advanced Sheets in Prentice-Hall, Paragraph 72,813, Prentice-Hall Federal 1955, and the Lipshitz case which is cited as Paragraph 72,880, Prentice-Hall Federal 1955. They are two recent cases dealing with similar situations in which the motion to suppress was upheld and I refer the Court to those cases, if he cares to study them.

[221] We will be very happy to brief the question, if the Court desires, at the close of the case.

THE COURT: What do you depend on here as the basis for the Court's ruling in your favor?

MR. WALTER: We contend very simply --

THE COURT: Not what you contend. What is in the evidence.

MR. WALTER: In the evidence -- we claim by the evidence that the assurances of Giles Kavanagh to the Petitioner induced the Petitioner to believe that if he submitted the books to the Internal Revenue Department they would be used only for purposes of determining the civil tax liability. And, without giving up his constitutional rights, the defendant, in order to defend himself from a criminal matter, he submitted them for that purpose and only on that inducement, to have the civil liability clarified and determined. And that's the only reason he submitted

those books, under the inducements and statements of Giles Kavanagh. That is our contention.

THE COURT: What do you point to as authority for the Internal Revenue Collector to have that power?

MR. WALTER: These two cases that I've just cited have held that where there was such inducement --

THE COURT: Give me that again.

MR. WALTER: The Shotwell case, which is cited as Paragraph 72,813 in Prentice-Hall Federal 1955.

[222] THE COURT: What are you citing from?

MR. WALTER: These are not yet published in the Federal Reporters, your Honor, and these are the Advanced Sheets.

THE COURT: What is it you are citing from?

MR. WALTER: These are Prentice-Hall Advanced Sheets, your Honor, prior to publication of federal case books.

THE COURT: We don't have those.

MR. WALTER: I'll supply these to you and see to it that you get them.

THE COURT: All right, you can prepare a memo on that and give it to me.

MR. WALTER: Yes, we will.

THE COURT: What do those cases hold?

MR. WALTER: The cases hold that while there is no statutory authority in any Government agency to promise immunity, that if by his actions and any statements he has induced the taxpayer to believe

that he should waive his constitutional rights and present matters for civil determination only, that the motion to suppress shall be granted.

That is the whole meat in these two cases. We are not contending that there was any authority in any Government agent to promise immunity. That is clear. The question is what went on in the Petitioner's mind under the inducement offered him? Was he induced by these representations to turn these books? That is the question in --

[223] THE COURT: Are they District Court or Courts of Appeal cases?

MR. WALTER: The Lipshitz case is in the Eastern District of New York, June 24, 1955, No. 43152. And the Shotwell case is a Seventh Circuit Court case -- United States Court of Appeals, Seventh Circuit, No. 11108 - 11111, June 15, 1955.

THE COURT: When were these cases decided?

MR. WALTER: June 15, 1955 and June 24, 1955.

THE COURT: Well, they certainly ought to be in the Federal Reporter series by now.

MR. WALTER: We have searched for them, your Honor, and up-to-date they have not appeared. We were hoping to give you the citations in the record, but we cannot; but we can supply copies of both. We have tried up to last evening to locate them, but they still were not in the library.

THE COURT: How close are those cases to the factual matters in the case before the Court now?

MR. WALTER: In the Shotwell case the petitioner had

come to the Internal Revenue Collector, Mr. Solberg, and had presented to him a situation that they had not made returns on certain over-ceiling transactions and that they had not shown those or reflected those in their income tax returns, and they said to him " What can we do about the situation? " He said, "Go to work and determine what your taxes are [224] and we will get you a civil determination and there is nothing to be concerned about as far as criminal prosecution is concerned. " And so they proceeded to that end and for a period of months they worked with the different agents and finally, with the cooperation of the taxpayer and the agents, developed the figures to correct the tax situation. After that was done they were indicted and a motion to suppress was filed and the Circuit Court held that the motion to suppress should have been granted, that there was no authority in the Internal Revenue Collector to grant immunity, but that if by his actions and his words he induced them to submit books and record, that that was in violation and derogation of the constitutional rights. That is the Shotwell case.

THE COURT: Did either of those cases go to the Supreme Court by certiorari?

MR. WALTER: I can't say as to that, your Honor.

MR. WOODS: The Shotwell case, I believe, is on appeal by the Government, and I am not acquainted with the Lipshitz case at all.

MR. WALTER: Now, the Lipshitz case was one where two agents had worked on the matter, one was the agent on the civil side and one was the agent on the penal side, and the agent on the penal side was asking the agent on the civil side to gather information for him, and it

developed that the information he gathered was then used by the agent on the penal side to get an indictment, and there the court held that the records were turned over to the agent on the civil side for only one purpose, [225] and that was to settle civil liability, and therefore is a violation of constitutional rights if it was used for criminal indictment.

MR. WOODS: How is that comparable to this situation?

THE COURT: What was done in the second case? I didn't quite catch that.

MR. WALTER: In the second case there was an agent who represented the civil side. He came out and went to work on the case and then there was aside, as is the usual practice, an agent on the penal side, and the agent on the penal side, without revealing he was gathering information for criminal purposes, had the agent on the civil side continue to work for a period of time, a substantial period of time, working with these taxpayers, to help get the civil information before the Department. After he had gained the information by that method he then proceeded to recommend prosecution and they were indicted and the motion was made by the defendants to suppress and the court granted that motion.

THE COURT: Who are the Government officials with whom each of these taxpayers was dealing?

MR. WALTER: In the first place, the Shotwell case, they dealt with the Collector of Internal Revenue, Mr. Solberg.

[226] THE COURT: That was a person in the same authority as Mr. Kavanagh was in here.

MR. WALTER: That's right, exactly in the same position

as Mr. Kavanagh was, and the other was with agents, one under the Collector of Internal Revenue who gathered the information, and the other was the Penal Agent who used the information to gain a criminal indictment.

THE COURT: As counsel knows, the Court has stated once or twice during the progress of this case that the results of the previous appeal and the attitude of our Court of Appeals on getting all of the data and testimony in the case. I don't know whether the Government is in any position to produce any data now, any information. Mr. Kavanagh is no longer here. I have no information about the agents, any of them, who were interested in this case and the activities which occurred, as testified to here, but it would seem to me that, especially in view of these two cases, that counsel for the Petitioner cited and quoted from, that it would be to the interest of the Government to make such factual showing other than legal argument, that it can make. And if the matter goes up to the Court of Appeals again, that Court may have every scrap of information which has to do with the progress of the case as it developed from time to time while it was alive and while Dr. Biggs was attempting to obtain immunity from criminal prosecution, and that of course is what this Court is interested in, especially in view of the opinion of the Court of Appeals [227] in the first case.

Now, the most I could do in this case at this time, is to take the case under advisement, go over it carefully, and the law that is cited by counsel here or will be cited by both sides eventually, but there may be that void that the Court of Appeals may say "that's only half of the case, what about the other half?" There is no showing made as to

what was done with the other half of the case, the Government's part of the case.

MR. WOODS: As a matter of fact, your Honor, the Government would certainly have no objection to your Honor taking this motion under advisement for the simple reason that there have been certain allegations made against certain of our people who happen to be alive, that we would like to have the opportunity to meet head-on here. All of our witnesses' testimony, as counter-opposed to the Petitioner's, is not with dead witnesses.

THE COURT: Well, it is a situation that of course at this stage it is up to the District Attorney to make the choice as to what the next step will be. And I don't want to be misunderstood and force the District Attorney to do something he does not want to do.

MR. WOODS: Of course not.

As I understood your Honor, you have indicated, if I am not mistaken, you will take such motion as has been made to dismiss [228] the motion to suppress under advisement, and you are now looking to the Government to proceed. Is that correct?

THE COURT: Yes, that would more or less like in a --

MR. WOODS: Criminal case.

THE COURT: Well, I was going to say in a civil case we do that quite often and that is to defer the decision on a motion of that kind.

MR. WOODS: We are prepared to proceed, your Honor.

THE COURT: And have the other side put its case in?

MR. WOODS: Yes, your Honor, we are ready to proceed.

THE COURT: That's fine. You may do so.

MR. WOODS: Thank you.

BYRON LESTER KRIEGER was thereupon called as a witness on behalf of the Government and, having been first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. WOODS:

Q What is your full name, please?

A Byron Lester Krieger.

Q What is your business or profession?

A I am an Internal Revenue Agent.

Q Located where?

A In Detroit, Michigan.

[229] Q For how long a period of time have you been employed by the Internal Revenue Department?

A Approximately ten years.

Q Were you employed in such capacity in the month of December, 1949?

A I was.

Q Were you on duty on that occasion?

A In December of '49?

Q Yes, sir. Excuse me, I mean 1948.

A '48.

Q Did you ever have occasion to meet the Petitioner herein, Dr. Raymond A. Biggs?

A Yes, I have.

Q When and where was the first time?

A I met him at his clinic on Gratiot. I would say the date was December 13th, 1948.

Q Here in Detroit, that is?

A In Detroit.

Q All right. Were you alone or were you with someone?

A If you mean from my office, I was alone.

Q That's what I mean. When you first met Dr. Biggs, was anybody with him?

A Yes, a Mrs. Gladys Baumann.

Q What conversations were had with Dr. Biggs on that occasion, on the 13th of December, 1948?

[230] A I had talked a little with Mrs. Baumann and she said that the Doctor would be some time before he got over from the hospital to the clinic, and when he came I asked him how about some of his records, how he handled his records.

Q Just a moment. Did you let him know who you were?

A Well, I had previously done that on a telephone conversation, and of course Mrs. Baumann introduced me to the Doctor.

Q I see. You had talked to the Doctor before?

A Yes, we had made this appointment to meet at the clinic.

Q Yes, go on. You met him on the 13th of December, 1948?

A Yes.

Q And what conversations did you have with him?

A At that time Mrs. Baumann had presented me with certain records that the Doctor had indicated to me in our telephone conversation he would have in relation to my checking his income tax returns -- his income tax returns.

Q And that is because you had asked him for certain books and records, or not?

A I had asked him at the time -- I told him over the telephone that I had his returns for the years 1944, '5 and '6 and that I wanted to check his records in order to substantiate the validity of those returns.

Q Did you specify what you meant by "records"?

A All of the records that would be used to make up that income tax return.

[231] Q All right. Coming up to the 13th of December, you stated that Mrs. Baumann --

A Mrs. Baumann had certain large manila envelopes as counsel has on his desk there, in which there was one for each of the years in which I was making investigation. In those envelopes there were certain records which they told me were used to make out the income tax returns and which I began to peruse.

Q Where? This is still at the clinic?

A Yes, this is still at the clinic.

Q On Gratiot. This is on the same day we are talking about yet?

A Yes.

Q The first day?

A That's right.

Q Anything else that day?

A I talked to the Doctor very briefly, but it was very much in generalities that day because I hadn't had much opportunity to look at the records.

Q Did you look at the records?

A I started to look at them, yes.

Q On that day?

A Yes.

Q All right, what next took place?

A I believe the Doctor left and I finished looking at the records. And whether I talked to the Doctor on the second day about the records, because, having gone through what they had given me, it appeared to me that there should be more than I had there in order to arrive at not only [232] what they had on their return, but also in relation to the size -- the apparent size of his clinic and the fact that the Doctor was a surgeon -- it was hard for me to understand how he was able to keep track of his income with just what records he had given me. And I asked him --

Q Just a moment, please. Were you present on the 24th day of February, 1949, when these so-called two Lawyers Handy Books were turned over?

A No, sir, I was not.

Q And you had certain books and records turned over to you,

however, on the 13th of December, 1948?

A Correct.

Q Were those two Lawyers Handy Books among them?

A No, sir.

Q Between December 13th, 1948 and the 24th day of February, 1949, when the Lawyers Handy Books were turned over, were you given by the Doctor or from his authorization any other books?

A No books.

Q No books. All right. That takes care of the 13th of December of '48. What else took place? You say the "second day". Do you mean by the "second day" the next day?

A The 14th. I came back the next day. I talked to the Doctor -- when I came out there Mrs. Baumann was out there and we started out looking over the records, and as I went through, as I mentioned previously, [233] it appeared to me that they would need more records to really make a determination of the income and the manner in which he had reported it. It appeared to me that there should be some other figures of income that I did not have.

Q So what did you do?

A I asked Mrs. Baumann and she had no knowledge of anything and I talked to the Doctor --

Q When?

A I believe that afternoon.

Q Where? At the clinic or some place else? By phone, or what?

A I believe it was at the clinic. I think it was in the afternoon

on the second day.

Q What conversations did you have with Dr. Biggs on the second occasion, on the 14th of December of '48?

A I talked to him at that time about the accounting system which they used, what records they kept, of his income and of his expenses. In other words, trying to arrive at what his entire set of records would consist of, and I pointed out to him certain relationships in matters to some of the years and I asked him if there wasn't more income involved in those years.

Q What years?

A At that particular time I think I took as an example the year '47 and '44.

Q What did he say?

[234] A Well, he told me -- he was explaining to me at that time the fact that -- he said that all of his surgical patients, which I was making reference to, were primarily people in factories and industrial workers who are covered by insurance and that he did not have any patients that were not covered by insurance, because I questioned him apparently from the way he computed his income which he reported on the return. There appeared to be no surgical patients which were not covered by insurance.

Q Did you have a conversation about that?

A Yes, I did.

Q What was that conversation?

A That is when I asked him about whether or not there could be some patients or was it possible that he had all patients that were covered

by insurance, and he gave me that explanation, that they were primarily industrial and factory workers who were covered by insurance. So I continued on then and I asked him that it would seem strange to me that there was not at least one patient in those years that was not covered by insurance.

Q What did he say?

A He did make a statement to me then that there could be some that might not have been covered by insurance. And in the course of my conversation he did quote a figure of a possibility of some $1400.00 in the year 1944 and the possibility of some $8,000.00 in the year 1947.

Q Nothing was discussed as to years 1945 and '6?

[235] A Not at that time.

Q Any other conversation with the Petitioner on that day?

A Well, after he explained to me the manner in which they kept the records, I asked him if he had any other records besides the ones he had just given me, and he said No, and I asked him if he had maintained any other records, and I made reference, I know, to Patient Record Cards, and he said that during those years he had not kept Patient Record Cards.

Q Now, over the period of weeks that followed this occasion, the 14th day of December, 1948, did you have occasion ever to ask the Doctor that question again?

A Yes, I did.

Q Once or more than once?

A Well, I would say once definitely, and I was also in a meeting--

later on I made that same request to his attorney, Mr. Snider.

Q With Dr. Biggs present?

A No, not at that time, but subsequently I did have occasion to meet with Mr. Snider, Mr. Sullivan and the Doctor at which we talked about that.

Q We'll get to that. But, suffice it to say, you asked for all of his books and records on more than one occasion?

A That's right.

Q Now, we have covered the 14th of December, 1948?

A No.

Q What else took place on the 14th of December?

[236] A I did ask him for records and I asked Mrs. Baumann about the records, too, and I asked her about certain cancelled checks and bank statements and asked her that if she could find any of the records because the Doctor said she would take care of assisting me in the examination, and she did go, as she told me later, to Dr. Biggs' home and she said, I believe, she went through the attic in order to find some of these checks and bank statements. She told me she had opened boxes in which she found these, and that there were other papers, but that they had no bearing -- were not books and records and had no bearing upon his financial affairs, and that these were the only records that she could find, when I made that request.

Q What next took place, Agent Krieger?

A There was a lapse of several days before I came back to the clinic again. I believe that was on the 20th.

Q 20th of December?

A 20th of December.

Q Of '48?

A Yes. I received the checks and the statements I had asked for at that time of Mrs. Baumann.

Q Did you see the Doctor on that occasion, the 20th of December?

A No, at that time I think I called the Doctor from the clinic at the hospital where he was working at the time, and I did ask him at that time if he had been able to assemble the names of the patients that were represented by this $1400, and this $8,000 he had mentioned to me at our [237] earlier meeting.

Q What did he say?

A He said No. And I asked him how did he arrive at those figures, and he said "Well, I have a pretty good idea of my practice, my patients."

Q Following the 20th day of December, 1948, then, what next took place in this case?

A On the 22nd of December I received a phone call from Mr. Norman Snider who said that he had been employed by the Doctor to represent him as counsel and he told me that the Doctor in his work was busy at the hospital and it was difficult for him to direct his attention to the examination, that he would help me in any way that he could, and he subsequently furnished powers of attorney upon representations of the Doctor.

Q Did you have any conversation with the Doctor on this occasion

of being informed that he was now representing the Doctor?

A I believe at that time I made an appointment to see Mr. Snider, which I did shortly thereafter.

Q Subsequent to the 22nd day of December, 1948, what next took place?

A I had a meeting with Mr. Snider in his office.

Q Here in Detroit?

A Yes, in the National Bank Building.

Q Who all was present on that occasion?

A In the meeting I believe just Mr. Snider and myself, although [238] I believe I met his brother at the inception of the interview.

Q Can you approximate that as to the date, Mr. Krieger?

A It would be possibly the next day, very shortly after our phone conversation.

Q Right around Christmas?

A Yes, I think it was a week or so before that because I met him again subsequent to that before the end of the year.

Q What was the tenor of that meeting or conference with Mr. Snider?

A Mr. Snider, of course, was interested in what I had accomplished so far in the way of how far I had gone in my examination and wanted to know what I would need further, and I explained to him that I had gone over the records at the hospital -- rather, at the clinic -- all the records the doctor had given me, and that it appeared to me that there was not enough in there for me to make a correct determination of the Doctor's

income, and I explained to him this point which I was concerned with in the matter of surgery patients, as to the fact that there had been represented to me, at least in these years I've talked about before, were all covered by insurance and I told him that I felt that I would need a net worth statement from the Doctor since I had no other records to use to make a correct determination of the taxpayer's income.

Q What was said to you then?

A Mr. Snider said that he would contact the Doctor and that he thought he would be able to work that up for me.

Q Was that about the sum and substance of that conference a day or two after the 22nd day of December, 1948?

[239] A That's right.

Q Up to this time, Mr. Krieger, were you the only Internal Revenue Agent on this case, to your knowledge?

A Yes, sir.

Q Were there any other agents working on this case, do you know?

A No, sir.

Q All right. Then subsequent to this meeting in Mr. Snider's office, what next took place?

A I received a phone call from Mr. Snider that he had some information for me and I went to his office and he had --

Q Just a moment.

A Yes.

Q Is the receipt of this phone call and your going to his office

on the same date?

A My memory is faulty on that, Mr. Woods. I couldn't say. But in response to --

Q Approximately when was this phone call made to you by Mr Snider, in point of time from the first conference you had there, which was a day or two you testified after the 22nd?

A Well, it would be sometime between that time and the 31st of December. It was probably a week or ten days.

Q It was within that seven or eight days?

A Yes, it was before the end of the year.

Q And, in any event, after the telephone call from Mr. Snider you went to his office?

[240] A Yes, sir.

Q And what time did you go to his office? Would that also be before the 31st of December?

A That's right.

Q Who was present on that occasion?

A Just Mr. Snider and myself.

Q Did you have conversations on that occasion?

A Yes, he presented me with certain figures which he had obtained from the Doctor as to his assets and liabilities. I believe that that represented the financial picture as of the end of a certain year rather than a period of years.

Q Do you recall what certain year it was?

A I believe it was January 1st, 1948 -- no, yes, I believe that

was it. Between that time I told the Doctor I was also going to cover the year 1947.

Q Now, when had you told the Doctor that?

A It was on one of the occasions, I believe, --

Q You called him on the phone ?

A I don't know whether it was told to him personally or in a telephone conversation, but it was sometime toward the end of my work at the clinic.

Q All right. In any event, in the second conference with Mr. Snider at his office before the 31st of December, 1948, what further was --

[241] A We went over the items that he had.

Q Do you remember any figures?

A Well, he gave me certain figures as to bank accounts, as to real estate, --

Q What about net worth, Mr. Krieger?

A Well, these items were included in that net worth. He had another figure in there for Government bonds which Mr. Snider told me he had not verified with the Doctor but had made some approximation. I believe he had a figure in there for some accounts receivable from other doctors, and I do not believe there were any liabilities. He had the figures for his home and the real estate, and so we looked at that and we talked about that for a while, and I asked him to get me the figures on the bond and I believe at that time we made a rough computation of approximately what the Doctor's financial position was at the beginning of 1944 and compared it with 1947, and then looked at that increased net worth in

comparison to what he had reported on his income tax returns over that period, using at that time an arbitrary figure for living expenses, and we made some estimation -- I did, that is, for the beginning figure for cash, which I felt was fairly substantial, but just to look at the picture as a result of that we put that figure in there. It was just a matter of conversation to see --

Q Approximately what his net worth was?

A That's right. And I think we came to a figure of some $40,000 [242] under-statement just on that rough computation and I told Mr. Snider that I thought the cash figure I used at the beginning was rather high and probably just by looking at it it could be as high as $60,000, and that was our main course of conversation there, and I think we arranged, or that he promised to call me at a subsequent time when he could get little more definite information as to bonds, and --

Q These are unsubstantiated figures?

A Yes.

Q All right. Did anything else then happen prior to the 31st day of December, 1948?

A I believe I talked to Mr. Snider on the phone about something I had come across in the county records and public records as to real estate holdings by Dr. Biggs, or at least that his name is associated with, which did not appear to be reflected in this net worth statement that Mr. Snider had given me, and I believe I talked to him about that and he said he would also ask the Doctor about that particular item.

We had a meeting on December 31st of '48 --

Q Who is "we" ?

A Mr. Snider, Dr. Biggs was present at that time, and myself.

Q Anyone else?

A No.

Q Where did that meeting take place?

A Again in Mr. Snider's office.

[243] Q What was the sum and substance of that meeting?

A The Doctor brought in the list, I believe -- he had gone to the safety deposit box and had brought in a list of war bonds he had, the serial numbers and the amounts and the dates purchased, and I also asked the Doctor about these so-called real estate transactions that I did not see reflected in this net worth statement, and he explained what the situation was in connection with this.

Q Any other discussion at that time about books and records?

A I would say I do not believe so because I think by that time I had exhausted my --

Q Inquiry into the books and records that were available?

A That's right, any other records.

Q Is that all that took place at that conference on the 31st of December?

A Well, the Doctor did explain to me certain transactions that he was in with other doctors and I had asked him about what his cash position was at the beginning of 1944, which he was unable to tell me, and the conversation mainly centered around the net worth at that time.

Q What next took place on the 31st of December, 1948?

A After the first of the year I believe I had a conference with Mr. Snider in which we talked about this net worth again and he asked me at that time if we could arrive at it since the Doctor was anxious to clear up his tax matter, and if he could arrive at some sort of a settlement through the use of net worth.

[244] I told Mr. Snider --

Q Where was this at?

A In Mr. Snider's office.

Q Was it after the first of January of '49?

A I would say Yes.

Q How much after?

A I would say within the first week.

Q All right, go on.

A It was along in the series of conferences where you go back and forth where you need additional information or if there is need for a conference, and I told him that I felt, having looked at the manner in which the taxpayer computed his income, reported his income, and what records I had, and what the rough computation of net worth shows, that I felt there was a possibility of a fraudulent reporting of income on his returns and that I was going to have to call a Special Agent into the case.

Q You told this to Mr. Snider?

A I did, because he was pressing me for an attempt to try to arrive at a settlement of the case and I told him that I would have to refer it to the Intelligence Division and to call in a Special Agent into the case.

Q What did he say as to that?

A Well, he said he hoped his taxpayer wouldn't be in any serious [245] trouble. Other than that I don't recall anything of any --

Q Any other conversations at the time this was made known to you -- by you?

A No. At that time I told him I would let him know when we would be able to get an appointment so that we could meet.

Q After having informed Mr. Snider, then, in the first week in January of 1949 that you are going to call in a Special Agent and that it looked like fraudulent reporting, -- is that the word you used?

A Yes, sir.

Q "Fraudulent reporting," what is the next thing you did, Mr. Krieger?

A I arranged for a meeting with Mr. Snider and Dr. Biggs in order to introduce a Special Agent to them.

Q Had you made arrangements then to get a Special Agent?

A Yes, I had referred that case to the Intelligence Unit, and Mr. Sullivan --

Q What is the Intelligence Unit?

A That is the section of our Internal Revenue Service that handles the criminal investigations.

Q What unit did you belong to at that time?

A I was with the Internal Revenue Agent's office.

Q That is the unit with which you are still attached?

A That's right.

Q You did not handle criminal fraud cases yourself, from the

[246] standpoint of the same manner that the Intelligence Unit did?

A No, sir.

Q So that the next thing you did was to contact the Intelligence Unit, is that correct?

A Yes, sir.

THE COURT: Just a minute. Is that the office that initiates prosecutions?

A That is correct, sir.

Q (By Mr. Woods) When you say "office", you mean the Intelligence Unit?

A That's right, that handles prosecutions.

Q Whom did you contact in the Intelligence Unit, the Criminal Fraud Section, do you recall?

A No.

Q In the normal course of events, would you just report the results of what investigation you had conducted to the Intelligence Unit, is that it?

A Well, it would go through channels in our office in most instances.

Q All right. In any event, as the result of the channeling process, you did have made known to you Special Agent Sullivan?

A Yes, sir.

Q When did you know that Sullivan had been assigned to this with you? Can you approximate that?

Before I interrupted you, you stated that you next made an

[247] appointment with Mr. Snider to have Dr. Biggs present so that you could introduce Special Agent Sullivan; is that not correct?

A No, I said "a special agent".

Q Excuse me, a special agent. And did you have that meeting with both Mr. Snider and the Doctor?

A And Mr. Sullivan?

Q And Mr. Sullivan.

A Yes.

Q When was that meeting?

A I believe the date is January 10th of 1949.

Q And sometime before January 10th you knew that Special Agent Sullivan had been assigned?

A That's right.

Q All right. Is the next thing that took place, talking to Mr. Snider to arrange for this new conference to introduce this special agent?

A That's right, that is the next conference that we had.

Q And you did have that conference?

A That's right.

Q On the 10th of January, '49?

A That's right.

Q Where?

A In Mr. Snider's office.

Q Who was present?

[248] A Dr. Biggs, Mr. Snider, Special Agent Sullivan and myself.

Q What was said on that occasion, Mr. Krieger? What was the

substance of that conference?

A Well, I introduced Mr. Sullivan.

Q To whom?

A To Mr. Snider and Dr. Biggs.

Q As what?

A As a Special Agent from the Intelligence Service, Intelligence Unit.

Q All right, after the introductions were over, what next took place at this conference?

A Special Agent Sullivan talked to the Doctor again in relation to the manner in which he kept his records.

Q Apparently Mr. Sullivan had been apprised of the results of your investigation?

MR. WALTER: I object to the form of the question.

Q (By Mr. Woods) All right. What did Mr. Sullivan ask the Doctor?

A He asked the Doctor to review what records he kept and how he kept his records of his income and of his expenses.

Q And what did the Doctor do in response to that request?

A The Doctor did outline the manner, his procedure.

Q Was it the same or different, as he had given it to you?

A No, it was essentially the same.

Q Any discussions at this conference on the 10th of January of

[249] 1949 as to books and records?

A Well, Special Agent Sullivan asked the Doctor certain questions

as to how he was able to keep track of accounts receivable, of his payments to referring doctors, and referring doctors, and surgical work, what we felt were a meager and inadequate set of records to cover such activities.

Q What did the Doctor say?

A He said, -- well, we felt he was rather vague about his answers, but he in essence maintained that that was all the records he had and that he kept no others.

Q All right, any other conversations on that date, the 10th of January, 1949? Can you recall anything else having been said at that time, or done?

A I believe it was after that same occasion, -- I am beginning to recall now that Mr. Snider brought up again the matter of settling this case or using the net worth as some means of arriving at the taxpayer's income, and any deficiency that there might be.

Special Agent Sullivan told Mr. Snider and the Doctor -- that is, he told them that we were not in a position to accept any estimates of income and that we were going to have to make our own determination in the best way possible in order to ascertain what the true income was.

Q Anything else on that occasion, or not?

A Further, Special Agent Sullivan said that in the absence of [250] having any other records, and not having, we felt, a complete set of records, that we would have to make a long and extensive investigation which would entail contacting many third parties, doctors and patients.

Q You mean, circularizing the patients?

A I don't know that he used that word necessarily at that time, but in effect that is what he said.

Q And this was said by Special Agent Sullivan to whom?

A To Dr. Biggs and Mr. Snider.

Q All right. Was anything said by them on that occasion?

A The Doctor made one statement that I recall. He said he would like to see some of the answers or replies that we received from referring doctors as to what payments they had made to him because he felt that there were doctors that owed him money that never paid him that might claim that they had.

Q Was that January 10th or January 28?

A Mr. Woods, I couldn't be --

Q You honestly don't remember?

A One interview could have slid into the other there. I can't be sure.

Q How many conferences did you have in the month of January, 1949, where Dr. Biggs was present when you were in attendance?

A In January?

Q Yes.

A I believe there was the one on the 10th and I believe it was [251] the 26th of January in which some of these conversations may have occurred.

Q It was either the 10th or the 26th?

A That's right.

Q By the way, you speak of a conference on both the 10th of

January and the 26th of January, to the best of your recollection?

A That's right.

Q Were the parties in attendance at each conference the same, as you recall?

A That's right, the same as before.

Q Now, have you covered in essence the substance of the conversations of the 10th and the 26th where these parties were present? Was anything else said? Any further conversations?

Let me rephrase it differently. Do you think you can recall any conversations pertaining to the 26th day of January, 1949?

A At that time, the 26th, I believe at that conference Special Agent Sullivan made reference to going out to the hospital.

Q What hospital?

A The Detroit Osteopathic Hospital, in order to obtain a list of surgical payments.

Q You say Special Agent Sullivan made known to who?

A To Dr. Biggs and Mr. Snider, and I think at that time there was a conversation as to how it was to be done.

[252] Q You mean the mechanics of going out there, is that what you mean?

A Yes.

Q Was anything said by Mr. Snider or Dr. Biggs on that occasion in response to that?

A I believe on the 26th that the Doctor then said he would make some arrangements for us to go to the hospital.

Q For introductions, you mean, so you could check such records?

A Yes.

Q All right. Was there anything else on that day?

A Not that I recall, Mr. Woods.

Q All right. We are now past the 26th of January, 1949, are we not?

A Yes.

Q Had anything happened between the two conferences of the 10th and 26th of January, 1949, that you can recall, other than apparently the arrangement to get together for the conference of the 26th? Anything else during that fifteen or sixteen days?

A I can't recall anything right now, Mr. Woods.

Q All right. Following the conference in Mr. Snider's office between Mr. Snider, Dr. Biggs, Special Agent Sullivan of the Intelligence Unit, and yourself as a Revenue Agent, on the 26th, what next took place?

A I believe after this tentative conversation that was held there Special Agent Sullivan talked to the Doctor then himself by phone, I believe, in order to make arrangements --

[253] Q To go to the hospital?

A To go to the hospital.

Q Did you go to the hospital?

A I did, later, with Special Agent Sullivan.

Q When did you go up there with Special Agent Sullivan?

A We were up there, I believe, on February 7th.

Q February 7th of '49?

A Yes.

Q That was the first time you had been there?

A That is the first time I was there.

Q How long did you spend there on that occasion?

A Oh, Special Agent Sullivan and I spent, I believe, and entire week there. -- February 7th, I believe, to the 16th.

THE COURT: The Court will be in recess for fifteen minutes.

(Recess.)

Q (By Mr. Woods) Just before we adjourned, Mr. Krieger, you spoke of two conferences in January of '49, one on the 10th and one on the 26th, one of which you apparently introduced Special Agent Sullivan of the Intelligence Unit, Criminal Fraud Section, and at the other meeting where you had had a conference in regard to other matters. Now, which one was which?

A May I just correct that? In talking to Mr. Snider and in telling him I was going to refer the matter to the Intelligence, the first [254] conference that I had, which was January 10th, was late in the afternoon with Mr. Snider, Mr. Sullivan and myself, rather than with Dr. Biggs.

Q So Dr. Biggs was not present on the 10th?

A No, I have to --

Q Was he present on the 26th?

A If the date was about that time --

Q He was present, in any event, at the second conference in the

latter part of January?

A There might have been one intervening meeting with Mr. Snider to take up some records at which Mr. Sullivan was also with me and at which Mr. Snider was not there.

MR. WALTER: You mean Dr. Biggs, don't you?

A I'm sorry. Dr. Biggs was not there, but it was on that later one that we had arranged to have Dr. Biggs present at that time.

Q All right. Now you stated that from the 7th of February, 1949, up to approximately the 16th day of that same month and year, you were at the Detroit Osteopathic Hospital?

A That's right.

Q And who was with you?

A Special Agent Sullivan and myself.

Q What were you doing there?

A We were making our list of the names and addresses, dates of operations of the surgical patients of Dr. Biggs and his associates at the clinic.

[255] Q Did you make such an investigation?

A We did.

Q Did you have any conferences in the month of February, 1949? By "you", I mean of course yourself, with any of these parties about whom we are speaking?

A I don't believe that I had any direct contact with him there in February in which I participated in, no, after the 16th.

Q The 16th you didn't have one?

A No, at that time we had occasion to see Dr. Biggs in and out of the hospital, but there were no further conferences that I attended that month.

Q You have heard the testimony here in the last two days relative to the conference held on the 24th day of February, 1949, wherein I believe it has been testified by someone that you were present at the time that these two Lawyers Handy Books were turned over. Were you present at that meeting?

A No, I was not, not on that occasion.

MR. WOODS: Mr. Walter, your witness.

MR. WALTER: No questions.

MR. WOODS: Thank you.

(Witness excused.)

MR. WOODS: Mr. McFarlane.

I might add, your Honor, if you are gaging your time, that we have Mr. McFarlane who should not take more than twenty minutes of direct examination. I don't know about the cross examination. And then [256] one other contemplated witness, Mr. Sullivan, of course. He may well take forty-five minutes to an hour and fifteen minutes for direct examination.

THE COURT: Well, this Court will be here tomorrow.

MR. WOODS: Yes, sir.

MR. WALTER: Your Honor, I have one problem. If you recall, when this case was arranged I shifted a Circuit Court of Claims case off of yesterday and they changed two cases around and reassigned

this other case in New York tomorrow morning. I hope we go as far as we can this afternoon and if I have to leave Mr. Steel will have to take over in my place, if that is satisfactory.

THE COURT: There isn't much the Court can do about it without the cooperation of counsel.

MR. WALTER: I understand. We're doing our best.

THE COURT: You may proceed.

JAMES P. McFARLANE was called as a witness on behalf of the Government and, having been first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. WOODS:

Q What is your full name, please?

A James P. McFarlane.

Q What is your business or profession?

A I am a Special Agent of the United States Treasury Department.

[257] Q How long have you been with the Treasury Department, Mr. McFarlane?

A I've been with the Treasury Department since 1943 and I've been a Special Agent since 1948.

Q You have been in court the last two days?

A I have.

Q Did you hear the testimony as was elicited on the witness

stand relative to Mr. Kavanagh having informed Mr. Snider that there would be no criminal prosecution of this Petitioner, Dr. Biggs?

A Yes, I did.

Q I'll ask you whether or not, Mr. McFarlane, you ever had the occasion to have any conversation with Mr. Kavanagh on that same matter?

A Yes, I did.

Q When?

A On January 8th, 1951.

Q Where?

A In his office in the Federal Building here.

Q In Detroit?

A Here in Detroit.

Q Who was present?

A Mr. Kavanagh and myself.

Q What was that conversation?

A I asked M. Kavanagh if he had ever met Dr. Biggs --

[258] MR. STEEL: Just a moment. We object to that. That's conversation with Mr. Kavanagh.

MR. WOODS: On what basis?

MR. STEEL: On the basis strictly of hearsay.

MR. WOODS: Then apparently your Honor it is the claim of the Petitioner that he has witnesses, opens up an avenue of conversations of his witnesses with the deceased Mr. Kavanagh, and renders the Government utterly indefensible then to put on a witness who can give the inconsistency of the statement, or attack the statement as claimed

to have been made by the Petitioner.

MR. STEEL: Well, you also have the situation that this was about two years after the statement was made.

MR. WOODS: We also have here a statement which was not contemporaneous in time, certainly, with the claimed statement as was made by Mr. Kavanagh.

THE COURT: Hasn't the Petitioner put in this record similar testimony?

MR. WOODS: That is our contention, your Honor.

MR. WALTER: Yes, your Honor.

I don't know what the purpose of Mr. McFarlane's testimony is. Maybe we can develop it and see what it amounts to, then if we want to rephrase our objection we can. I don't know what he is going to testify to.

THE COURT: Well, of course, if the one is inadmissible, [259] then the other is inadmissible.

MR. STEEL: That would be correct.

MR. WOODS: You wouldn't render the Government defenseless, would you?

MR. STEEL: No, that's correct.

MR. WALTER: That's all right.

Q (By Mr. Woods) All right, what was that conversation with Mr. Kavanagh?

A I asked Mr. Kavanagh if he had ever contacted or had ever met Dr. Biggs, and he said Yes, he had. He said that in November or

December, he couldn't quite remember which, of 1948, Dr. Biggs came to his office and he told Mr. Kavanagh that he was under investigation by the Treasury Department; that he had no books or records, and that he was very much concerned because it appeared that the agents were going to circularize his patients. So Mr. Kavanagh told him that despite the fact that he had no books or records, the Government had ways and means of finding out what his income was anyway and that he should cooperate as well as he could, under the circumstances.

Q Any other conversations with Mr. Kavanagh in regard to that same matter?

A Well, at the same time Mr. Kavanagh told me that a short time later Dr. Biggs came back to his office and he was still very much concerned about the situation. He told him he had hired Mr. Norman Snider as his attorney.

[260] Q You mean Mr. Snider had told Mr. Kavanagh as Mr. Kavanagh related to you?

A That's right.

Q And he, Dr. Biggs, --

A Had hired Mr. Snider to represent him.

Q All right.

A Dr. Biggs asked Mr. Kavanagh what kind of an attorney Mr. Snider was and Mr. Kavanagh told me that he told Dr. Biggs that Mr. Snider was a competent attorney. Mr. Kavanagh said that he told Dr. Biggs, however, that if the case ever came to a point where it developed into a criminal prosecution case he had better get an experienced attorney

who could handle the trial because Mr. Snider was not a criminal lawyer.

Q Anything else?

A Mr. Kavanagh said that a short time later -- that is a few days later, Dr. Biggs came back from his office again, but he couldn't recall exactly what he did say on that third occasion.

Q Did you have any discussion with Mr. Kavanagh as to this immunity business?

MR. WALTER: Object to the leading question.

MR. WOODS: Strike that last question.

Q (By Mr. Woods) Did you have any other conversations with Mr. Kavanagh?

A On that same day he said that after Dr. Biggs' third visit, a short time after that, Mr. Snider came into his office and he said that [261] Dr. Biggs had told him that one of his girls had found a little black book in which she kept a record of some of Dr. Biggs' income and Mr. Snider at that time told Mr. Kavanagh that he was very much concerned about the possibility of criminal prosecution. He wanted to know what effect it would have if this little black book were turned over to the Revenue Agents, whether it would stop them or prevent them from recommending criminal prosecution or not. Mr. Kavanagh told me that he told Mr. Snider that it would probably help but he would not guarantee that there would be no criminal prosecution.

Q Was that all of the conversation on that occasion with Mr. Kavanagh as to this matter?

A Yes, it was.

Q Did he have -- did you have any further conversation with Mr. Kavanagh as to this matter?

A No, I did not.

Q You were present in the courtroom yesterday, Mr. McFarlane, when for the first time we heard from Mr. Snider that Mr. Grunewald had told Mr. Snider that there would be no criminal prosecution of the Petitioner, Dr. Biggs. Did you hear that testimony?

A Yes, I did.

Q I will ask you whether or not, Mr. McFarlane, you knew Mr. Grunewald?

[262] A Yes, I did.

Q How did you happen to know Mr. Grunewald?

A He was my superior.

Q Did you have any conversations with Mr. Grunewald relative to this promise of immunity or that there would be no criminal prosecution of Dr. Biggs?

A Yes, I did.

MR. WALTER: Object to the leading form of question again. He can ask what conversations he had without leading.

Q (By Mr. Woods) Did you have a conversation with Mr. Grunewald?

A Yes, I did.

Q When was that conversation?

A Well, it was after my final report was written.

Q When was your final report written?

A It was dated February 7th, 1950.

Q A short time after that?

A Well, I would say within three or four months after.

Q So that puts us somewhere in the spring of 1950? That's about as close as we can get?

A Approximately.

Q Where did that conversation take place?

A In Mr. Grunewald's office.

Q Who was present?

A I believe I was the only one present and Mr. Grunewald.

Q What was that conversation, Mr. McFarlane?

A It was principally about his conversations with Mr. Kavanagh.

[263] Q Let's have the conversation you had with Mr. Grunewald relative to that?

A Well, Mr. Grunewald told me that when the investigation was first begun Mr. Kavanagh called him and asked him if this was a criminal case. Mr. Grunewald said that he told Mr. Kavanagh that he didn't know because the case had not progressed to a point where a decision could be made and Mr. Grunewald said that Mr. Kavanagh told him that the Doctor was very much perturbed about the fact that the men were going to circularize his patients, and Mr. Grunewald said that he told Mr. Kavanagh that inasmuch as there were no records or anything like that to enable the agents to determine his income that that was about what they would have to do.

Q Anything further pertaining to this?

A Not in regard to Mr. Kavanagh in Mr. Grunewald's first conversation, but in that same conversation with Mr. Grunewald he also told me that sometime later Mr. Kavanagh called him again and wanted to know if there was any decision made as to whether or not this was going to be a criminal case and Mr. Grunewald said that he told Mr. Kavanagh there was still no decision made because the case had not gotten to a point where any decision could be made.

Q Is that it?

A That's all Mr. Grunewald told me.

MR. WOODS: Mr. Walter.

[264] MR. WALTER: No questions.

MR. WOODS: Thank you.

(Witness excused.)

MR. WOODS: Oh, excuse me, let me recall him for a couple of questions, if I may.

Pardon me, Mr. Walter.

(Witness McFarlane resumed the witness stand.)

Q (By Mr. Woods) Do you know Mr. Norman Snider?

A I do.

Q Did you have any conversations with Mr. Snider in regard to this case?

A Yes, I did.

Q Can you recall the time and the place?

A It was on August 12, 1949, in his office in the Dime Building.

Q Who all was present?

A Just Mr. Snider and myself.

Q Was that in regard to this matter?

A Yes, it was.

Q By "this matter" I mean the Biggs case.

A That is correct.

Q What were those conversations with Mr. Snider?

A Well, I told Mr. Snider that it was my understanding that certain allegations had been made that Dr. Biggs had been promised that there would be no criminal prosecution if he turned over those Lawyers Handy Books to the Agents and I told Mr. Snider I wanted to learn the truth [265] of the matter.

Now, Mr. Snider told me he had had various discussions with the Agents about this case and that he had tried to persuade them to settle it on what he described as an estimated income basis and that they had refused to do it. And he said then that he had agreed to turn over the books to the Agents. He said that the only reason that the books were turned over to the Agents was to aid them in determining the Doctor's correct income. He said there was no agreement whatever by the Agents that there would be no criminal prosecution if he gave them the books.

Q Any conversations about Mr. Kavanagh?

THE COURT: Who made that statement?

A Mr. Snider.

THE COURT: To you?

A To me.

Q (By Mr. Woods) Anything else, Mr. McFarlane?

A I did ask Mr. Snider if he would give me an affidavit to that effect.

Q That's right. What did he say?

A This was on a Friday afternoon, late Friday afternoon, 3:15 it was when I was at his office, and he said he would, but he said it was rather late in the afternoon and he didn't want to take up his girl's time at that time to dictate it.

Q Did you follow this up?

[266] A Yes, I did.

Q When?

A Well, he said he would do it over the week end and he would have it for me on Monday morning.

Q Did you check back?

A I went back to his office on Monday morning.

Q Did you get your affidavit?

A No, I did not.

MR. WOODS: No questions. Your witness.

MR. WALTER: No questions, Mr. McFarlane.

MR. WOODS: Thank you.

Mr. Sullivan.

JOHN R. SULLIVAN was called as a witness on behalf of the Government and, having been first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. WOODS:

Q I've been waiting to hear from you. What is your name, please?

A John R. Sullivan.

Q What is your business or profession?

A I am presently an Internal Revenue Agent.

Q What kind of an Agent?

A I am an Internal Revenue Agent and formerly I was a Special Agent in the Intelligence Unit.

[267] Q I see. How long have you been with the Treasury Department, Mr. Sullivan?

A About nine years.

Q Were you in such capacity and employed in such capacity in the year 1949?

A Yes, I was.

Q Did you have any occasion to come in contact with the case of Dr. Biggs?

A Yes.

Q Can you tell me approximately when that was?

A About January 10th, 1949.

Q Can you tell me how that came about, if you will, please?

A The Internal Revenue Agent Krieger had been assigned the income tax returns of Dr. Biggs for 1944, '5, '6 and '7 to audit and after his initial investigation he was under the impression that there was some discrepancy between the reported income and the true income and he was suspicious of fraud and he therefore requested the assignment of a special agent and I was assigned to the case.

Q You were it?

A That's right.

Q You were a Criminal Fraud Agent, isn't that a fact?

A That's right.

Q I notice you have a book there. What is that?

A That is my diary for the year 1949.

[268] Q Say, January 10th, 1949, what happened on that day, specifically, as you remember it, Mr. Sullivan?

A Well, --

Q You are referring to your diary now?

A That's correct.

Q Is that your diary?

A This is a diary which I prepared during the year which lists the various calls I made, the people that I see and generally the mileage that I incurred during the year.

Q That helps you make out your expense voucher primarily?

A Primarily.

Q Is it made in your handwriting?

A That's right, it is.

Q Are the entries made therein made contemporaneously or approximately contemporaneously with the acts they purport to reflect?

A Yes, they are.

Q All right.

A On January 10th, about 2 o'clock in the afternoon I had a meeting in Mr. Norman Snider's office in the National Bank Building with Revenue Agent Byron Krieger, which was my initial meeting with Mr. Snider.

Q How did you meet Mr. Snider?

A I was introduced to him by Mr. Krieger.

Q As what? Do you remember?

A I believe as a Special Agent of the Intelligence Unit. I haven't [269] used any other designation at that time.

Q All right, what conversations took place on this January 10th meeting, Mr. Sullivan?

A At that time we reviewed the prior audit that had been made by Revenue Agent Krieger and certain statements that had been made by Dr. Biggs to Mr. Krieger, principally the fact that his surgical cases were all covered by insurance and it seems rather strange, and I mentioned that to Mr. Snider and thought perhaps there should be some other explanation. We asked Mr. Snider -- or, rather, I did, if there could be any more records. From certain information as to the scope of Dr. Biggs' activities, it would appear that he was doing a considerable amount of surgical work and we wished to further determine the amount of that.

That was about the sum and substance of the talk on that day.

Q What did Mr. Snider say in response to these inquiries of yours?

A At that particular time we reviewed this net worth basis and he thought there was -- and he admitted that there appeared -- that there was a discrepancy between the reported income and that which his net worth showed, and he thought perhaps we could work on that basis in trying to determine --

Q What basis?

A On this net worth basis, in trying to determine what he should [270] have paid in tax.

Q Anything else at this conference of January 10th?

A No, that is about the extent of it.

Q What is the next thing that took place?

A Well, there was nothing of an active nature, excepting on January 12th Mr. Krieger and myself had another meeting with Mr. Snider and I believe at that meeting is the one that certain records were brought up to date by Mr. Snider with regard to the net worth. He was to get some records regarding bank accounts and that sort of thing. We were trying to fill it in where they had been estimating it before.

Q Nothing else of any significance on the 12th of January?

A No.

Q What else took place?

A I didn't have any meetings with Mr. Snider or Mr. Biggs, but I had made a call at the Detroit Osteopathic Hospital and there I secured the admittance --

Q When?

A That was on January 25. And I talked to I think it was Mr. Lindbergh, Dr. Lindbergh, who was the superintendent, and I secured from him at that time what they call the "Admittance Records" which showed the various patients that were admitted into the hospital as Dr. Biggs' patients. I took those back to the office --

Q By "patients" you mean patients admitted in Dr. Biggs' name, [271] as Dr. Biggs' patients?

A That's right.

Q All right.

A I took those back to the office, and the following day, January 26th, I went to the Michigan Medical Service to secure the records of the names of the patients that were covered by Blue Cross and on which Dr. Biggs received payment for surgery. It took a little time. I just made arrangements on the 26th with the Michigan Medical Service, and then they said that they would have those ready at a later date.

Q Anything else on the 26th?

A No, that is all.

Q All right. What was the next thing that took place?

A On January 28th we had a meeting at Mr. Snider's office with Revenue Agent Krieger, myself, Mr. Snider and Dr. Biggs was present at that time.

Q Is this the first time you had met Dr. Biggs?

A That is correct.

Q Who introduced you to Dr. Biggs?

A Mr. Snider.

Q What took place at this conference?

A Well, at this conference I reviewed the audit that had been made and the certain statements that had been made by Mr. Krieger, and I also repeated the various statements that were attributed to Dr. Biggs by [272] Mr. Krieger and asked the Doctor if that was the manner in which his income was reported.

The important thing -- or, to my mind, the thing that was most important at that time, was the statement of the Doctor that every patient had been covered by Blue Cross or other insurance; that he didn't have any patients that paid him any money in addition to the Blue Cross or that had any independent billings, and he insisted at that time that it was the truth and that that was his surgical income, as covered by this insurance, which was reported on his tax return.

Q What did you say?

A Well, I told him at the time that from experience that I had had investigating various doctors, that it would appear that the minority of the doctors' surgical patients were covered by Blue Cross and that in addition, on the face of the policy, which the Michigan Medical Service issues, it states that if a man's income is twenty-five hundred dollars or less the suggested fee would be all that would be charged. And in most of the cases, at that particular time, even if the man were working in a factory, his average income would be between four and five thousand dollars, so that it did not seem consistent with the practice of other doctors.

Q What else was said?

A Well, at that time I advised the Doctor that we haven't had any records of his patients on which he had performed surgery; that in the absence of records it would be necessary for us to secure the names and [273] addresses from the hospital and to write to these patients and to find out just how much money they had paid to Dr. Biggs. And he insisted that he couldn't be of any help to us at all in securing any more records, that if that's what we had to do we should go ahead and do it, and I think that terminated the meeting that day.

Q And you are speaking now of the 28th of January, 1949?

A That's correct.

Q What was the next thing that took place?

A Well, on January 31, I secured the records from Michigan Medical Service which listed the names and addresses and the amounts that were paid to Dr. Biggs, and I compared those to the names of the patients that were admitted as Dr. Biggs' patients and I found that a number of the patients that were admitted to the hospital as Dr. Biggs' patients were not on the Michigan Medical list and also some that were on the Michigan Medical list were not admitted as Dr. Biggs' patients. It seemed that he had quite a number of patients over and above those that were covered by Blue Cross.

Q When did this take place that you are talking about?

A This took place on January 31, February 1 and February 2nd.

Q Where?

A In my office, in the Michigan Medical office on February 2nd -- no, that is through February 1st, that took in that.

Q Anything else from the 31st to the 2nd of February?

[274] A On the 2nd I went to the Detroit Osteopathic Hospital and I saw Dr. Lindbergh.

Q With whom did you go, by yourself?

A That's correct. I had previous to that discussed and I had talked to Dr. Biggs -- I'll have to backtrack on this January 28th meeting. I asked the Doctor if he would make arrangements for us to secure these records of these names and addresses at the hospital and he said he would and he made arrangements with Dr. Lindbergh to furnish me a place to work and to secure the proper records, and on February 2nd I went to the Detroit Osteopathic Hospital, I saw Dr. Lindbergh, I returned these admittance records I had used, and made arrangements to secure the information that we wanted; namely, the names and addresses and dates on which these people were admitted to the hospital and were --

Q All right, what next took place?

A Well, the next, -- evidently it was on the 7th --

Q 7th of what?

A Of February. And I went to the Detroit Osteopathic Hospital with Agent Krieger and on the 7th, 8th, 9th and 10th and the 11th, 14th, 15th and 16th we stayed at the Detroit Osteopathic Hospital and secured all of this information, which was some six thousand names and addresses of patients that were operated on by Dr. Biggs.

Q Who was "we"?

[275] A Revenue Agent Krieger and myself.

Q This is in February of 1949, from 1 to the 16th, you say?

A That's right.

Q What subsequently took place?

A Subsequent to that time I had conversations with Mr. Grunewald who was my supervisor and I discussed with him the fact that we had all of this information; that there were no books produced by the taxpayer in order to verify his tax return in regard to surgery, and I felt that it was necessary that we write to each of these patients to find out how much was paid to the Doctor for each operation.

Q In the vernacular, you refer to that as "circularizing"?

A That is correct.

And after a discussion with Mr. Grunewald, and that was necessary because that was going to entail the use of three or four stenographers in the office, we decided to go ahead because it looked like potentially one of the vast understatements of income that had been made on these returns.

Q When did this take place, do you recall?

A That was just shortly -- that would be after the 16th of February.

Q Tell me, in point of time, was it sometime before the 24th of February, 1949?

A Well, I would say that all of the mechanics for this circularization program had been completed before February 21st.

[276] Q All right, now go on. What next took place?

A Well, during this period, after preparing all of this information, and I was in the process of doing that, and the girls were getting

ready to send these letters out, and at 3:30 on February 23rd I had a call from -- or earlier in the afternoon I had a call from Mr. Snider who said that Dr. Biggs would be in his office and wanted to talk, that he had some particular records. So I went to Mr. Snider's office and Dr. Biggs said that he had some records that were kept at the hospital, the Detroit Osteopathic Hospital by Fay Horton.

Q What date was that that you were informed of this by Dr. Biggs and Mr. Snider?

A On February 23rd.

Q Where?

A In Mr. Snider's office.

Q Who all was present?

A Mr. Snider, Dr. Biggs and myself.

Q All right.

A He mentioned that these records had been kept by a Fay Horton at the hospital and I had previously talked to this Fay Horton at the hospital sometime before, possibly a week before. I heard her name mentioned by one of the other osteopaths that we were cross-checking with to find out how much money had been paid to Dr. Biggs, and I went to the hospital and talked to her. She claimed at that time not to have any [277] records, but her manner was rather evasive. I felt, rather than talk to her in the lobby of the hospital, it would be better to have her down at the office and I so informed her that at a later date I would call her and have her down to our office for a sworn statement with regards --

Q You informed her of that sometime prior to the 24th of

February, 1949?

A That is correct.

Q All right.

A On this conversation of February 23rd, the Doctor told me he had these records and he also informed me that Pauline at his office had kept a record of his insurance to be received and that he would give me these records. Well, arrangements were made --

Q At that time?

A At that time, that the Doctor would bring them down the next day to Mr. Snider's office. So the next day Dr. Biggs --

Q Which would be February 24th, 1949?

A That is correct, February 24th. I went to Mr. Snider's office.

Q With whom?

A I was alone. At that particular time Mr. Krieger was working on another case and could not be reached. So I went to Mr. Snider's office and I arrived before Dr. Biggs by a few minutes. He came in and he had a paper sack, grocery sack, and in that sack he had two of these [278] Lawyers Handy Books. And I asked him to give them to Mr. Snider. He wanted to hand them to me and I said "Give them to Mr. Snider and have Mr. Snider look them over and then we will talk about them, see if there are any questions." Then Mr. Snider looked them over and remarked that they were Lawyers Handy Books and he gave them to me, and I asked Dr. Biggs a few questions as to what they represented, what the initials in the books were, and so on, andsoforth, and he answered all of the questions, and that was the manner in which the books were passed over.

Q Did you have any further conversations at the time these books were turned over to you of any other nature?

A No.

Q On February 24th, 1949, in the office of Mr. Snider, when these two Lawyers Handy Books which are here in question were turned over to you by Mr. Snider, after having been handed to Mr. Snider by the Petitioner, Dr. Biggs, was anything said at that time or prior thereto on the 23rd of February, 1949, by either Dr. Biggs or the attorney, Norman Snider, that these two books were to be given to you, were to be taken by you only if there was not to be any criminal prosecution?

A No, no mention was ever made of criminal prosecution.

Q At any time?

A At any time by myself or by Dr. Biggs.

Q You have been here for two days, have you not?

A That's right.

[279] Q I show you this affidavit. Let us look at No. 1.

Showing you Government's Exhibit No. 3, which is an affidavit signed by the Petitioner, Dr. Raymond A. Biggs, bearing the date of February 3rd, 1950, I will read this to you from the next to the last paragraph:

"Deponent further says, that he did not turn the books over to the Government on his own free will and waive any privilege of immunity, but turned over these books and records to Agent Sullivan solely upon his promise and agreement that said investigation was not of a criminal nature, and

that he had nothing to fear from any information these books might disclose."

Is that true or is that false?

A That is false.

Q All right. We aren't done. Look into Government's Exhibit No. 4, which is an affidavit of the Petitioner, Raymond A. Biggs, signed and sworn to, as was the other one. This one on the 27th day of February, 1951. I will read to you the last paragraph:

"Relying upon the statements of Special Agent Sullivan and believing that the investigation was purely civil in nature, and relying upon the express promises and assurances of Mr. Kavanagh, both direct and transmitted through Mr. Snyder, deponent surrendered his books."

Do you have any notions of what statements, Special Agent [280] Sullivan, the deponent in this affidavit could be referring to?

A No, I don't.

Q At any time?

A It would be impossible for me to make any statements of that nature, primarily because I had no authority to grant immunity or to tell anyone that they would not be civilly prosecuted.

Q Aside from the fact that you had no authority, Mr. Sullivan, the particular point in question is, -- the important thing is: Did you, whether you had the authority or not?

A I did not.

Q At any time?

A At any time.

Q Did you have any conversations with Mr. Ray Cashen in regard to this matter?

A Yes, sir, I did.

Q When?

A Well, this particular exhibit, the first one, I think it is Government's Exhibit 3 --

MR. WOODS: Let's make sure.

Q (By Mr. Woods) Is that the one? (Handing document to the witness.)

A Yes, sir.

Q All right, that's Government Exhibit 3. What about it?

A That was presented to Attorney Shelton of the Penal Division. [281] And at one time I was called to sit in in conference regarding this case and this information was made known to me.

Q By whom?

A By the Government Attorney.

Q Who was it?

A Mr. Shelton.

Q Who all was present?

A I think Mr. Shelton, Mr. Cashen and I think Mr. McFarlane and myself, and I asked Mr. Cashen why these statements were made and he said -- I said, "I can't understand them", and he said, "You know, if you can't attack the merits of the case you attack the agents."

Q There was some testimony earlier today, Mr. Sullivan, about

your Irish face, your expression on it, by the Petitioner. Did you know prior to February 24th, 1949, that Dr. Biggs, the Petitioner herein, claimed that he had been given immunity by Mr. Kavanagh or by any other person?

A I don't believe -- as a matter of fact I know there was no mention made to me of any conversations between Mr. Snider, Dr. Biggs and Mr. Kavanagh. I didn't know that they were even acquainted with Mr. Kavanagh.

MR. WOODS: Mr. Walter.

MR. WALTER: No questions.

(Witness excused.)

MR. WOODS: That's all, your Honor.

[282] MR. WALTER: Nothing further, your Honor.

THE COURT: Well, this thought occurs to me, gentlemen. We have gone through two days of testimony here that affects the issue in this case. And, in view of Mr. Walter's statement a while ago that he has a case before the Claims Court in Cleveland -- do you want to come back and argue this case? Make an oral argument? Or, do you want to submit it on written argument and brief in addition to the short brief that was filed.

MR. WALTER: I am wondering if we might submit the briefs to you and then have a short oral argument after you have had the briefs before you.

THE COURT: Of course, I would like to have that done in a relatively short time.

MR. WALTER: Have we any idea how soon this record

might be completed?

THE COURT: Are you ordering the record?

MR. WALTER: Yes. If we prepare briefs, I would like to order the record.

THE COURT: I don't know. Mr. Court Reporter, can you advise the gentlemen on how much time it would take to get that record out?

THE REPORTER: I would need at least ten days or two weeks.

MR. WOODS: Since counsel has suffered the pain of order-
[283] ing the original, will you make a copy for the Government?

MR. WALTER: He should be commended for his economical attitude.

MR. WOODS: Your Honor, I have an argument in Cincinnati on a tax case on the 22nd and I can assure your Honor that with a couple of other problems I have at the present time, that the balance of the time between now and the 22nd is going to --

THE COURT: You mean the two other problems at home?

MR. WOODS: That's where I'll be spending a good share of my time. But I'd like to impose upon your Honor to allow me to spend the balance of my time up to the 22nd on the B & B tax case.

THE COURT: The Court will give both of you some reasonable time.

Of course, this case has been lying around for some considerable time and we don't want to prolong it any more than is necessary.

MR. WALTER: I understand. We'll cooperate in every

way.

THE COURT: Well, you won't have the record before two weeks. Is that what you are going to wait for? If you weren't going to wait for the record, well, of course, --

MR. WOODS: I'm prepared to stand and argue this matter orally right now and get this --

MR. WALTER: I'm wondering if we could have two weeks --

[284]

THE COURT: What time is it now?

MR. WALTER: It's 4:30, your Honor, and if I'm to get to New York I've got to get to the airport and get moving pretty soon.

If we could have two weeks from the date of the completion of the record we will have our brief out.

MR. WOODS: Two weeks from the date you receive the record?

MR. WALTER: Yes. We will advise theCourt when we will receive the record and two weeks from that day we will file our brief.

THE COURT: Well, the Court reporter stated it will take about two weeks to get the record out.

Now, when you have the record, how much time will you need? One week ought to do for preparing an argument.

MR. WALTER: Well, we have a pretty lengthy record. We have to prepare it and get it back to you.

THE COURT: Two days' trial isn't so much.

MR. WOODS: It seems like a lot to me.

MR. WALTER: It looks like we have a pretty big record

here, your Honor.

THE COURT: These issues have been discussed and re-discussed over and over again.

MR. WOODS: I think, generally, this matter boils down to a relatively simple matter. The Government doesn't need any more [285] than several days after the receipt of the record to have their brief in.

THE COURT: Well, let's say a few more days after the record is out to complete it, and the Court will set a date for the argument.

MR. WALTER: All right.

MR. WOODS: Is that two weeks apiece?

THE COURT. Yes.

Well, you may not wish an oral argument.

MR. WALTER: May we advise the Court by agreement of the parties if we desire an argument, and advise the Court?

THE COURT: You may submit the matter on briefs or you may ask to have it argued orally. What the Court wants most of all is to have you point out to the Court that portion of the record on which the Petitioner relies here to prevail in this case.

MR. WALTER: All right, your Honor.

THE COURT: And that seems to be relatively simple.

MR. WALTER: I think so.

MR. WOODS: One further matter, your Honor.

The Government makes a motion at this time, renews its motion to strike the testimony introduced by the Petitioner pertaining to

this 90-day letter business which occurred a year subsequent to the turning over of these books and records. I assume your Honor will take that under advisement as well; is that correct?

[286] THE COURT: Well, inasmuch as the Court is going to have the copy of the proceedings, that will be disposed of together with the main issue.

MR. WOODS: Thank you.

THE COURT: We will adjourn now.

Supposing these exhibits be turned over to the custody of the Court Reporter at this time to be turned over to the Judge when he is through writing up the record?

MR. WOODS: Yes, sir.

(End of hearing.)

- - -

Petitioner's Exhibit No. 1

Mr. Kavanagh confirms the fact that Mr. Snider told him about the existence of the two books and asked him whether Dr. Biggs would be safe from prosecution if the books were turned over to the agents to facilitate the determination of the civil tax liability. Mr. Kavanagh was under the impression that this was a civil, not a criminal, tax case and so advised Mr. Snider. He further advised Mr. Snider that under the circumstances, he (Snider) had no alternative but to surrender the books or withdraw from the case.

Mr. Kavanagh understood that he had no authority to "promise immunity" in a criminal case. On the other hand, since the Biggs case, as he thoug , was merely a civil case, Mr. Kavanagh felt it his duty as Collector to advise Mr. Snider of this fact and to insist that the books be surrendered in the interest of getting the tax determined and paid.

This statement is correct.

Giles Kavanagh

Government's Exhibit No. 3

AFFIDAVIT (Dr. Raymond A. Biggs)

STATE OF MICHIGAN,)
) ss.
County of Wayne.)

DR. RAYMOND A. BIGGS, being duly sworn, deposes and says:

That on or about the 10th day of December, 1948, Byron L. Krieger, a Revenue Agent of the Bureau of Internal Revenue, came to him and stated that he was making an investigation of his income tax returns and asked him to turn over to him, for such an investigation, any books, records, or documents pertaining to the operation of his profession.

That early in the part of January, 1949, said Agent Krieger, introduced him to John R. Sullivan, stating that Mr. Sullivan was out of the Intelligence Unit of the Bureau of Internal Revenue and that he was going to work with him in making the investigation of said deponent's income tax returns.

Deponent further says, that from time to time thereafter he saw said agents at the Osteopathic Hospital and at his office making their investigation.

Deponent further says, that in the latter part of January and the early part of February 1949, said Agent Krieger telephoned him and severely reprimanded him, alleging that he had failed to cooperate and assist them in making their investigation of his income tax returns, and suggested that he search not only the hospital and his office but his home for any books or records that he might have pertaining to the operations of his profession.

Affidavit of Dr. Raymond A. Biggs

(Gov. Ex. #3)

Deponent further says, that on the following day, Agent Sullivan telephoned him and told him that he was of the opinion that this deponent was giving them the runaround; that he was sure that he had certain books and records pertaining to his operations, and that he could see no reason why this deponent would conceal or withhold any of his books or records from these agents in making their investigation, because such investigation was purely civil, and that he had nothing to fear if he turned over any information to him; that it would be to this deponent's advantage because with records and books, the investigation could be speeded up and closed out within a short time.

Deponent further says, that shortly thereafter, he telephoned said Agent Sullivan, who again assured him that said investigation was purely routine, civil in nature, and that he was free to turn over to him any books or records of any kind or nature that he had in connection with his business. Thereupon this deponent informed said Agent Sullivan that he had two day books; one covering the year of 1946 and the other covering the year of 1947, and that if said investigation was only a civil matter, as said Sullivan had claimed then, he would be glad to turn over these books to him.

Deponent further says, that it was then discussed how Sullivan could get such books, and your deponent told him that on the next day, it being the 24th day of February, 1949, he was going downtown and if he would meet him at the office of Norman Snider, Attorney at Law, National Bank Building, he would turn over to him these books.

Deponent further says, that he then telephoned his attorney

and informed him that he was coming to his office the next morning to turn over certain books to said Agent Sullivan, whereupon said attorney asked him if he knew what he was doing in turning over such records to the Government, and he then informed his attorney that he had thoroughly discussed the matter with Agent Sullivan and had come to an Agreement with him and that he had nothing to fear in turning over these books to the Government for their investigation.

Deponent further says, that on the 24th day of February, 1949, he went to the office of Attorney Snider in the National Bank Building and met Agents Krieger and Sullivan, and without any discussion with anyone, he turned over the books to Agent Sullivan, who again assured him that these books would greatly hasten the investigation, and that he would have the same completed in the early part of May, because he was going to get married in the latter part and wanted to get this case cleaned up.

Deponent was under the impression because of his Agreement with Agent Sullivan, that there was nothing criminal involved in the investigation of his income tax, and it was only after he employed the services of Attorney Ray Cashen, did he discover that John R. Sullivan was no longer connected with the Intelligence Unit, and that the investigation was being carried on by James McFarlane, and that his own books and records were going to be used against him, and that every attempt was going to be made by the Government to prosecute him criminally.

Deponent further says, that he did not turn the books over to the Government on his own free will and waive any privilege of immunity,

but turned over these books and records to Agent Sullivan solely upon his promise and agreement that said investigation was not of a criminal nature, and that he had nothing to fear from any information these books might disclose.

Deponent further says, that because said Agent Sullivan informed him that the investigation of his income tax returns were not of a criminal nature and that he was free to turn over any and all information to the Government, that he did not consult his then Attorney Norman Snider, or did Attorney Snider pass upon or even comment the question of immunity; that these books and records were given to Sullivan solely upon his representation to this deponent, that said investigation was not of a criminal nature.

And further, Deponent sayeth not.

s/ Raymond A. Biggs

Subscribed and sworn to before me, a Notary Public, this 3rd day of February, A. D. 1950.

Mary Kocoves
Notary Public, Wayne County, Michigan

My commission expires Oct. 1, 1957

(Gov. Ex. #4)

AFFIDAVIT OF RAYMOND A. BIGGS

STATE OF MICHIGAN,)
) ss.
County of Wayne.)

RAYMOND A. BIGGS, being duly sworn, deposes and says, that the following statement is true and correct in all respects:

The investigation started with the arrival of Revenue Agent Krieger on December 10, 1948. A day or so later deponent mentioned the matter to another osteopath, Dr. Harry Ekelman. Dr. Ekelman claimed to be a friend of the Collector, Giles Kavanagh. He went to see Mr. Kavanagh and deponent believes that Dr. Ekelman called him from Mr. Kavanagh's office. Thereafter Dr. Ekelman recommended hiring attorney Norman Snyder and went with deponent to see Mr. Snyder. Deponent thinks that he first saw Mr. Snyder about December 20, 1948. He paid him a retainer fee of $2,500.00 on December 22, 1948.

Shortly after Snyder was employed he and his brother, another lawyer, went with deponent to see the Collector, Mr. Kavanagh. This was around Christmas time. Snyder had called the Collector from his office. As deponent and Snyder's brother walked down West Lafayette Street, Norman Snyder went into the Post Office lobby and picked up Mr. Kavanagh and the four of them then went to lunch at Ye Ole Wayne Club. At lunch Snyder mentioned the fact that deponent was in some tax trouble. Mr. Kavanagh apparently knew who deponent was. He asked how much was involved and was told what years the investigation was covering, 1944 to 1947. Mr. Kavanagh then said to deponent: "You will have to pay the tax and probably can't get away from the penalties, if you owe the money, but there is nothing else to worry about."

Deponent conferred in Mr. Snyder's office with Agent Krieger shortly after January 1, 1949. The only matters discussed were deponent's bonds, bank accounts, and such things.

Special Agent Sullivan appeared between January 15th and 21st of 1949, on a Thursday or Friday. Deponent met him in Mr. Snyder's office. Snyder had warned deponent that Sullivan was to be there and that he was with the Intelligence Unit. In response to Sullivan's questions, deponent said that he did not have any records. Sullivan asked if he could have access to the hospital records. About three days later on a Monday, Sullivan came out to the hospital and deponent introduced him to the superintendent. Arrangements were made that Sullivan was to return later to examine the records. He came back the following Thursday and worked on the records for two or three weeks. About three weeks after the Agents started working on the hospital records, letters started going out to patients.

Deponent made a second visit to the Collector about this time, after the Agents had started sending out letters to his patients. Deponent asked Kavanagh why it was necessary to send out letters to his patients. Kavanagh said that this did not mean anything, but was just routine. He repeated that there was nothing to worry about, that there would be no prosecution and nothing serious. He repeated again that deponent would have to pay the tax and penalties if he owed the money. Snyder explained to deponent that Kavanagh was the boss and that they should simply let the Agents work at the case.

Sometime after the middle of February, Snyder called deponent

down to his office. He repeated Kavanagh's assurance that there would be no prosecution, and asked that deponent furnish the Agent's something to go by in figuring the amount of the tax due. Snyder said: "I have Giles' word that there will be no prosecution". He inferred that he had had this assurance from the start. At that time Snyder did not know about the existence of the books. Deponent said he would see what he could find. Deponent called Snyder about two days later and told him that he had the books for two of the four years. However, deponent said to Snyder: "I am not giving these books to anybody until I have assurance that they will not be used against me." Deponent added to Snyder, "If you need consultation in this case now is the time to get it". Snyder said, "I want to think about this over night." He called deponent the next morning at 8:00 a.m. at the hospital, and said: "I want to talk to Giles Kavanagh." Snyder called deponent back at 1 or 2 p.m. the same day and reported that Kavanagh had said he wanted to talk to Mr. Grunewald before giving the final word. Snyder called back later the same day and reported that Kavanagh had said to tell deponent to go ahead and turn over the books, that there was not going to be any prosecution.

The next morning (on February 24th) deponent went to Snyder's office by appointment, with the books. Both Agents were there. Deponent handed over the books. The Agents asked him a few questions about items in the books, initialling of payments, etc. They took the books with them without giving him any receipt. Nothing whatsoever was said about the use of the books, prosecution, voluntary surrender, etc. Snyder asked Sullivan when he would expect to get the case settled up.

Sullivan replied that he would know in about thirty days how much money was due and could then settle the case. There was no discussion in connection with the surrender of the books either then or any other time about the letters going out to the patients. The surrender of the books had nothing to do with the circularizing of deponent's patients.

During the weeks following the appearance of Special Agent Sullivan and before the surrender of the books, deponent had several telephone conversations with Sullivan, and the latter on each occasion, demanded that deponent make a further search for his records and turn them over to the agents. In this connection Sullivan each time assured deponent that the investigation was just routine and that if the records were made available, the tax could be determined and the case closed within a short time. Sullivan definitely led deponent to believe that the investigation was civil in nature and that the surrender of books and records would serve to expedite the final settlement.

Relying upon the statements of Special Agent Sullivan and believing that the investigation was purely civil in nature, and relying upon the express promises and assurances of Mr. Kavanagh, both direct and transmitted through Mr. Snyder, deponent surrendered his books. This surrender was not voluntary and deponent did not intend to waive any of his constitutional or other rights and privileges.

And further Deponent sayeth not.

s/ Raymond A. Biggs

Subscribed and sworn to before me, a Notary Public, this 27th day of February, A. D. 1951

ALICE MOODY
Notary Public, Wayne County, Michigan
My commission expires May 26, 1953

Petitioner's Exhibit No. 5

U. S. TREASURY DEPARTMENT
OFFICE OF INTERNAL REVENUE AGENT IN CHARGE
1800 Penobscot Building
Detroit 26, Mich.

INTERNAL REVENUE SERVICE

Detroit Division

In Replying Refer To: IT:Conf.

March 8, 1950

Dr. Raymond A. Biggs
11025 Gratiot Avenue
Detroit 5, Michigan

Dear Dr. Biggs:

You are advised that the determination of your income tax liability for the taxable years 1944 to 1947, inclusive, discloses a deficiency of $284,544.71, with penalties of $147,047.63, as shown in the statement attached.

In accordance with the provisions of existing internal revenue laws, notice is hereby given of the deficiency or deficiencies mentioned.

Within 90 days (not counting Saturday, Sunday or a legal holiday in the District of Columbia as the 90th day) from the date of the mailing of this letter, you may file a petition with The Tax Court of the United States, at its principal address, Washington, D. C., for a redetermination of the deficiency or deficiencies.

Respectfully,

Geo. J. Schoeneman

Commissioner,

By (Sgd.) Geo. E. Neal

Internal Revenue Agent in Charge

Enclosure:
Statement

db

PLAINTIFF'S EXHIBIT 5-A

Form 1276
TREASURY DEPARTMENT
Internal Revenue Service
Revised April 1946

NOTICE

Appeals should be addressed to

THE TAX COURT OF THE UNITED STATES

Washington 4, D. C.

IF YOU DECIDE TO INITIATE A PROCEEDING BEFORE THE TAX COURT OF THE UNITED STATES, an original and four carbon copies of your petition, embodying a copy of the deficiency notice enclosed herewith, should be prepared in accordance with the Rules of Practice of said Tax Court (especially rules 4, 5, 6, 7, and 26). (A copy of the Rules of Practice will be furnished free upon request to the Tax Court.) Under the Revenue Acts of 1926, 1928, and 1932, the Revenue Acts of 1934, 1936, and 1938, the Internal Revenue Code, and the rules of the Tax Court, a petition (together with a filing fee of $10) must be delivered, whether by mail or otherwise, in sufficient time to be RECEIVED AND FILED OF RECORD BY THE TAX COURT, at its principal address, WASHINGTON 4, D. C., within the number of days indicated in attached notice after the attached registered notice is mailed (not counting Saturday, Sunday, or legal holiday in the District of Columbia as the last day of the time specified).

The Tax Court of the United States is in no way connected with the Bureau of Internal Revenue or the Treasury Department. Under no circumstances should a petition for redetermination be forwarded to the Commissioner of Internal Revenue or a collector of internal revenue

U. S. Government Printing Office: 1949)-823833

Government's Exhibit No. 6

Penal Division, Chief Counsel's Office,
Bureau of Internal Revenue

Detroit, Michigan

In Re: Dr. Raymond A. Biggs.

In conference with the Detroit office of the Penal Division on April 27 we made the point that the deficiency notice issued in this case on March 8, 1950 had placed this taxpayer in a most difficult position - unique in our experience in any case where criminal prosecution was under consideration. We were asked to file a memorandum on the point.

The deficiency notice proposes a deficiency assessment for the years 1944 to 1947 inclusive in the aggregate amount of over $284,000 in taxes and $147,000 in penalties, a total of over $431,000, not including interest. The determination which is stated to be based on "information on file in the Bureau", involves a finding that the taxpayer received net in these years approximately $400,000 of additional "income from profession" which was not reported in his returns.

The taxpayer believes in good faith that the Commissioner's demand is plainly exorbitant - that the findings of additional income are grossly inflated. The taxpayer has not been supplied with a Revenue Agent's report in accordance with the usual procedure nor has he been advised, except very generally, as to the nature of the information "on file in the Bureau". If this taxpayer in fact and in law owes any additional taxes for these years he is ready and willing to pay them, but he is not disposed to pay a demand which he considers exorbitant until he is directed to do so by a court of competent jurisdiction.

There is only one course open to a taxpayer under the circumstances of this case - to file a petition in the Tax Court within the 90 day period. The compulsion to file the petition is inescapable. If the petition is not filed within the 90 days (which incidentally can not be extended) the Tax Court will have no jurisdiction to hear the case, and the Commissioner will be under a mandatory duty to assess and collect the ertire amount demanded in the deficiency notice. Sec. 272(c).

To invoke the jurisdiction of the Tax Court and stay the assessments the petition must comply with the rules of the court. Rule 7 dealing with the petition provides:

> "The petition shall contain: * * *
>
> "(D) Clear and concise assignments of each and every error which the petitioner alleges to have been commited by the Commissioner in the determination of the deficiency." * * * *
>
> "(E) Clear and concise numbered statements of the facts upon which the petitioner relies as sustaining the assignments of error, * * * "
>
> "(H) A verification by the petitioner; * * * ".

Rule 7 further provides:

> "Failure of the petition to comply with this Rule * * * shall be ground for dismissal of the proceeding for failure properly to prosecute".

The machinery for invoking the jurisdiction of the Tax Court and staying the assessment is unlike other legal proceedings. The taxpayer's petition is in a sense an answer to the Commissioner's demand as set forth in the deficiency notice. But a general denial by the taxpayer will not do. The burden of proof, except as to the fraud issue, is on the answering party (the taxpayer) not upon the party making the demand.

The taxpayer must state his position affirmatively in order to get into court.

The taxpayer is therefore placed in a position where he must either state his position, including the facts upon which he relies, under oath, or surrender his right to have the Tax Court pass upon the Commissioner's demand.

At the same time, and prior to the issuance of the deficiency notice, this taxpayer has been advised that a recommendation that he be prosecuted for income tax evasion for these same years is under consideration in the Bureau. In the light of this fact how is the taxpayer to regard the deficiency notice? The Government can not compel the taxpayer to state his position in connection with the proposed criminal charge or investigation. He has a constitutional right to refrain from assisting the Government in any way in making a criminal case against him. Yet he is confronted by a demand by the same arm of the Government which is considering his prosecution that he pay $431,000 plus interest or file a sworn petition in the Tax Court stating his position and the facts upon which he relies in support thereof.

It has been suggested that there may be no compulsion here - that the taxpayer can refrain from filing the petition and permit the Commissioner's claim for taxes and penalties, however exorbitant, to be assessed and collected. He can then file a claim for refund and after the lapse of six months he can file a suit in the District Court or the Court of Claims asking for the recovery of his money. It will hardly be seriously argued that this procedure provides the taxpayer with a real alternative in

such a case as this. For one thing the claim for refund, like the Tax Court petition, "must set forth in detail and under oath each ground upon which a refund is claimed, and facts sufficient to apprise the Commissioner of the exact basis thereof". Regulations 111, Section 29.322-3. See also I.R.C. Section 3772 (a) (1), making the filing of such a claim in accordance with the Regulations a condition precedent to any suit. This sworn statement of facts would have to be filed within two years after the date of payment (Section 322), and very likely prior to the final disposition of the criminal case. This procedure would merely postpone the date of disclosure - to a time which might well be much more critical from the point of view of self-incrimination.

More important are the economic realities of the situation. Where the demand is large in relation to the taxpayer's net worth, he is forced under the refund procedure to liquidate his properties for what he can get, to pay over the proceeds to the Government, and ultimately after the lapse of several years to recover the amount of the overpayment. This may be due process of law but it will hardly commend itself to a taxpayer as a fair substitute for the Tax Court procedure which is open to all other taxpayers.

It has also been suggested that the taxpayer had it within his power to avoid the issuance of the deficiency notice by signing the waivers (Forms 872) which were tendered to him on December 6, 1949 by the office of the Revenue Agent in Charge. This assumes that the taxpayer, by not returning the waivers, forced the Bureau to issue the deficiency notice to protect the Government's interests. The waivers are applicable

to the years 1944, 1945 and 1946. The period of limitations as to 1946, it was explained in the letter of transmittal, would expire March 15, 1950. The period as to 1944 and 1945 would expire, it was explained, on June 30, 1950. No mention was made of the year 1947. A taxpayer reading this letter might reasonably anticipate that if he declined to return the waivers the Commissioner would take steps sometime before March 15, 1950 to preserve his rights as to 1946. There was no reason to anticipate an immediate deficiency notice or assessment as to 1944 and 1945, and clearly no basis to assume that any formal demand was imminent as to 1947. Yet the deficiency notice issued on March 8, 1950, included 1944 and 1945 along with 1946, and for good measure threw in 1947. Clearly the deficiency notice went far beyond what was required to protect the Government's interests and far beyond anything which the taxpayer and his counsel might reasonably have anticipated.

Further in regard to the waivers it may be noted that on the Commissioner's own theory, no statute of limitations question was presented. Section 276 (a). The assertion of the fraud penalty is entirely inconsistent with the catagorical statement in the letter requesting the waivers that the statutory periods for these years "will expire" in the dates mentioned. The taxpayer is, of course, given no assurance that the execution of the waivers will result in postponing the issuance of a deficiency notice. The letter of transmittal makes no mention of this possibility, and the Commissioner's right to issue the notice forthwith would not be affected by the extension of the period. Incidentally these waivers were sent to the taxpayer alone - not to his authorized agent in accordance

with the power of attorney on file. The taxpayer's attorney knew nothing of the waivers until after the holidays - probably not until after January 3, 1950, the dead line set in the letter for their return.

The petition which must and will shortly be filed in the Tax Court by this taxpayer will of course not be tantamount to a confession. Error will be assigned in respect to the fraud issue, and if the Commissioner asserts fraud in his answer in accordance with the deficiency notice, his allegations will be denied. Error will also be assigned in respect to the finding of additional net income, but in this latter connection the taxpayer must state the facts on which he relies. He must adopt a position in regard to his returns and his records. In so doing he will be making commitments on the facts and as to the theory of his defense -- commitments which the Government is not in a position to demand from him in any criminal investigation or proceedings.

The broad scope of the constitutional privilege against self incrimination is well settled. We quote from Wigmore on Evidence, Third Edition, 1940, Section 2260:

> "Most criminal acts are made up of two or more subordinate facts, each essential to the completed crime * * * In all these instances, no one of the component facts constitutes of itself the crime, and yet any one of them must be established in order to establish the crime. It is therefore obvious that unless the privilege is to remain an empty formula easily evaded, its protection must extend to each one of these facts taken separately, as well as to the general whole."

We quote also from the opinion by Chief Judge Cardozo, then on the New York Court of Appeals, in Re Wm. F. Doyle, 257 N.Y. 244, 177 N.E. 489:

Government's Exhibit No. 6

> "A witness is not required to show, in order to make his privilege available, that the testimony which he declines to give is certain to subject him to prosecution, or that it will prove the whole crime, unaided by testimony from others. It is enough, to wake the privilege into life, that there is a reasonable possibility of prosecution, and that the testimony, though falling short of proving the crime in its entirety, will prove some part or feature of it, will tend to a conviction when combined with proof of other circumstances which others may supply."

The compulsion upon this taxpayer to make a sworn statement of his position became effective upon the issuance of the deficiency notice. Once that event had occurred nothing could be done in connection with the civil phase of this matter which would relieve the taxpayer of the necessity of filing his petition. He must file the petition in order to stay the assessment and collection of the tax. In so doing he must follow the law and state his position under oath. The Tax Court can give him no relief, since that court has no jurisdiction until the petition is filed. Until that is done the Tax Court is powerless to act.

The situation is different in all prior cases which we have found bearing upon this subject. In every instance the court whose process is being used to obtain incriminating evidence has jurisdiction of the parties and can act to protect the defendant in his claim of privilege. The case most nearly in point is Bowles v. Trowbridge, N. D. California, 60 F. Supp. 48. This was a suit for treble damages brought by the O. P. A. Administrator alleging a violation of O. P. A. price regulations. The plaintiff proposed written interrogatories to be answered by the defendant under Rule 33 of the Federal Rules of Civil Procedure. The defendant claimed his constitutional privilege against self incrimination.

The court, having jurisdiction of the parties, was in a position to protect the defendant by sustaining his objection to the interrogatories. We quote from the opinion:

> "An action for treble damages would not be a bar to a later criminal suit by the United States against the defendant. It cannot be questioned that the defendant in such criminal action would have the privilege of refusing to testify. Yet if the privilege does not extend to the present action, incriminating testimony might be elecited from defendant here which would enable his conviction in a criminal case. If this be so, the protection guaranteed by the Fifth Amendment would be an empty shell."

The practical effect of the issuance of the deficiency notice in the instant proceeding is similar to that of the interrogatories in the Trowbridge case. The only difference is that the Tax Court, not having jurisdiction of this proceeding, is powerless to protect the taxpayer in the exercise of his constitutional privilege. The same difference exists in connection with the "discovery" cases. It is uniformly held that a court of equity will not compel a defendant to answer a bill of discovery where his answers might tend to incriminate him. This rule is discussed at length in State of Michigan ex rel. Moll v. Danziger, 238 Mich. 39, 213 N. W. 448, annotated in 52 A. L. R. 143. Again in all these cases the court is in a position to protect the defendant in the exercise of his constitutional privilege.

What is the legal effect of this compulsion which the court and everyone else is powerless to abate? Perhaps a taxpayer in this unique circumstance acquires some sort of immunity when he is compelled to disclose his position in a Tax Court petition. We have been able to find no law on this precise point, but the contention would certainly be made on

Government's Exhibit No. 6

behalf of this taxpayer if he were subjected to criminal prosecution.

But entirely apart from any legal immunity the issuance of the deficiency notice on March 8, 1950 covering all four years, in the circumstances of this case, constituted at the very least an unfair practice. We do not suppose that this was a deliberate attempt on the part of the Bureau to "smoke out" this taxpayer. But whether deliberate or not it is open to that construction. This case involves a basic question of fairness in the handling of tax prosecutions. If investigating agents are free to issue deficiency notices in such cases in any amount and for any and all years, without regard to the type of action needed to protect the Government's interests, then, it is submitted, the Treasury Department is guilty of an abuse of the Tax Court process and is attempting through indirect means to circumvent the taxpayer's constitutional privilege.

In this memorandum we have considered only one aspect of the deficiency notice in relation to the pending recommendation for prosecution - the use of the deficiency notice to force the taxpayer to state his position in a sworn statement to the Tax Court. Another aspect of this relationship should not be overlooked - the use of the criminal sanction as a threat in aid of the collection of a claimed civil liability. We are aware of Treasury policy in this regard and realize that its violation in isolated instances may be unavoidable. But regardless of any deliberate intention to misuse the threat of prosecution in this case the effect is nevertheless the same. This taxpayer is convinced, rightly or wrongly, that the recommendation for prosecution is closely related to the civil tax demand, and his reaction to the civil tax claim, however inflated he may consider

Government's Exhibit No. 6

it to be, is undoubtedly affected by the background fact that a criminal charge against him is under consideration.

The unfairness of coupling the deficiency notice with a contemporaneous threat of prosecution is accentuated where the amount of the civil tax claim is exorbitant. We believe that such is the case here, although we are not yet prepared to discuss the merits. It will be apparent, we believe, upon an analysis of the evidence available to the Government to support its demand, that a substantial portion of the alleged additional income would not be provable in any court, and further that only a relatively small part would be appropriate (assuming proof of wilfulness) for inclusion in a criminal indictment.

Respectfully submitted,

Joseph S. Platt

Ray Cashen

Attorneys for the Taxpayer

Petitioner's Exhibit No. 7

U. S. TREASURY DEPARTMENT
OFFICE OF INTERNAL REVENUE AGENT IN CHARGE
1800 Penobscot Building
Detroit 26, Mich.

INTERNAL REVENUE SERVICE

In Replying Refer To:
IT:C:PPB

May 1, 1950

Mr. Ray Cashen
Axford, Cashen, Nolan & Baird
2117 Dime Building
Detroit 26, Michigan

Dear Mr. Cashen:

In re: Dr. Raymond A. Biggs
Detroit, Michigan

Years: 1944 to 1947, inclusive

Receipt is acknowledged of your letter dated April 2[illegible] 1950, requesting to be informed of the nature of the information which formed the basis for statutory notice issued to the above-named taxpayer on March 8, 1950. This letter has been referred to Mr. J. H. Shelton, local representative, of the Chicago Regional Office of the Chief Counsel, Penal Division, for consideration and reply.

Very truly yours,

(Sgd.) Geo. E. Neal

Internal Revenue Agent in Charge

PPB/mrs

Petitioner's Exhibit No. 8

U. S. TREASURY DEPARTMENT
BUREAU OF INTERNAL REVENUE
Suite 620, 105 West Monroe Street
Chicago 3, Ill.

OFFICE OF CHIEF COUNSEL

Address Reply To
REGIONAL COUNSEL, PENAL DIVISION
And Refer To:

MAY 9 1950

CC:P:CR:DD:JHS/IMB
306135

Mr. Ray Cashen
Axford, Cashen, Nolan & Baird
2117 Dime Building
Detroit 26, Michigan

In re: Raymond A. Biggs, D. O.
Detroit, Michigan

Dear Mr. Cashen:

Reference is made to your letter dated April 27, 1950 and addressed to Internal Revenue Agent in Charge George E. Neal. Your letter was referred to this office by Mr. Neal for consideration and reply. You state that: "We respectfully request that you send us a copy of the Revenue Agent's report, in accordance with the usual procedure, also that you give us an opportunity to examine and make copies of any additional information which has been relied upon in your determination of the tax deficiency."

The 90-day letter issued on March 8, 1950, in the above-entitled case asserts that your client is liable to the Government for a 50% fraud penalty for the years 1944 to 1947, inclusive. The institution of criminal prosecution against your client has been recommended under Section 145(b) of the Internal Revenue Code for the years 1944 to 1947, inclusive.

Please be advised that you are correct in stating that it is the usual procedure of the Bureau to send a copy of the revenue agent's report when a 90-day letter is issued. However, this case presents the exception to the usual procedure, as it is not the policy of the Bureau to send a copy of the revenue agent's detailed report in a case where criminal prosecution has been recommended.

Petitioner's Exhibit No. 8

506135

Accordingly, the request contained in your letter cannot be granted at this time. However, when the merits of the criminal case have been disposed of, this office will be happy to advise you as to which department of the Bureau will have jurisdiction of the civil liability. At that time you may wish to renew your request to that department.

Very truly yours,

(Sgd.) Joseph A. Struett

Joseph A. Struett
Regional Counsel

smc/cmg

cc: Mr. George E. Neal
Internal Revenue Agent in Charge
1800 Penobscot Building
Detroit 26, Michigan

Petitioner's Exhibit No. 9

AFFIDAVIT OF NORMAN SNYDER

STATE OF MICHIGAN,)
) ss.
COUNTY OF WAYNE.)

NORMAN SNYDER, being first duly sworn, deposes and says that the following statement is true and correct in all respects:

That deponent was formerly attorney for Dr. Raymond A. Biggs in connection with an income tax investigation covering the years 1944-1947 inclusive. About the middle of February, 1949, during deponent's employment as such attorney, deponent asked Dr. Biggs whether he could furnish the examining agents with any books or records which would enable the agents to compute the amount of tax due and get the case settled. Dr. Biggs called deponent a few days later and told him that he did have record books for two of the four years. Dr. Biggs stated to deponent, however, that he would not under any circumstances turn over these books to the agents unless he had absolute assurance that he would not be prosecuted. Deponent stated that he would like to think this matter over and would call Dr. Biggs the next day. Deponent did call Dr. Biggs the following morning and stated that he, deponent, wished to take the matter up with Giles Kavanagh, the Collector. Deponent went to see Mr. Kavanagh the same morning, told him about the existence of the books and repeated Dr. Biggs' insistence that he be given absolute assurance on the matter of prosecution before surrendering the books. Mr. Kavanagh stated to deponent that he wished to look into the matter further before advising deponent. Later the same day Mr. Kavanagh called deponent and advised him that the case was not considered appropriate for prosecution and that Dr. Biggs would be safe in turning over the books in order to facilitate the determination and payment of the tax liability. Deponent thereupon called Dr. Biggs and repeated to him the substance of what Mr. Kavanagh had said, saying in effect that he had

been assured there would be no prosecution and that Dr. Biggs could safely surrender the books.

Although it is possible that Deponent may have misunderstood Mr. Kavanagh, Deponent gained the impression that Mr. Kavanagh had ascertained from the agents that the case was not regarded as a prosecution case at that time, and that he, Mr. Kavanagh, therefor felt that the important thing was to collect any taxes due. In any event, Deponent definitely understood that Dr. Biggs was being given the ~~absolute~~ assurance against prosecution, ~~which he insisted upon having~~ before he would surrender the books. During the same conversation, Mr. Kavanagh added that since this was ~~not~~ a civil tax case, Deponent ~~might be in danger of losing his Treasury card if he failed~~ to turn over all available information.

The day after Deponent had repeated to Dr. Biggs the assurances given him by Mr. Kavanagh, Dr. Biggs brought the two books to Deponent's office and they were turned over to the examining agent.

And further, Deponent sayeth not.

_____

Subscribed and sworn to before me, a Notary Public, this_____day of June, A. D. 1952.

_____
Notary Public, Wayne County, Michigan

My commission expires_____

would ~~have~~ be obliged to turn over the books to withdraw from the case.

Petitioner's Exhibit No. 9

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_____
Notary Public, Wayne County, Michigan

My commission expires_____

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ORDER DENYING PETITION TO SUPPRESS EVIDENCE

(Entered June 15, 1956)

On a petition for pre-indictment suppression of evidence.

Petitioner, Raymond A. Biggs, is an osteopathic physician and surgeon who operates a clinic at 11025 Gratiot Avenue in the City of Detroit and performs surgical work at the Detroit Osteopathic Hospital.

He filed a petition to restrain the United States Attorney from using as evidence before the Grand Jury or in any criminal prosecution of petitioner two "Lawyer's Handy Books" which he made available to the Bureau of Internal Revenue, and to suppress the books and their contents as evidence. Petitioner seeks this protection under the Fifth Amendment to the Constitution.

The books sought to be suppressed were kept at the hospital by petitioner's secretary, who made therein day by day entries relating to petitioner's surgery patients. Specifically, petitioner claims that he surrendered the two books upon assurances to his attorney by Giles Kavanagh, then Collector of Internal Revenue at Detroit, that the government did not consider petitioner's case an appropriate one for prosecution and that petitioner would be safe in turning over his books to agents of the Bureau of Internal Revenue to facilitate the determination and payment of his tax liability.

The government moved to dismiss the petition on the grounds that it is lacking in equity and that the issue was prematurely raised. It relied on the decision in CENTRACCHIO v. GARRITY, 198 F. 2d 382,[1/] for its contention that the remedy of pre-indictment suppression of evidence

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1/ Certiorari since denied, 344 U. S. 866.

is limited to cases of illegal searches and seizures arising under the Fourth Amendment, not invoked here, and that even if In Re FRIED, 161 F. 2d 453, on which petitioner relied, extended the remedy to an allegedly coerced confession under the Fifth Amendment, the CENTRACCHIO decision held it inapplicable because no coerced confession was involved and it is equally inapplicable to this case for the same reason. Petitioner, on the other hand, urged that surrender of the books under the circumstances alleged in this case was tantamount to a coerced confession.

The issue raised on the motion posed a novel and complex problem. Judge Rifkind, who decided the FRIED case in district court, 68 F. Supp. 961, 962, recognized it as one of first impression, and the view of the appellate court in the same case was expressed in as many separate opinions as there were eminent judges considering it on appeal. 2/

This court, approving the reasoning of the court in the CENTRACCHIO v. GARRITY case, supra, sustained the government's position and dismissed the petition for want of equity. On appeal by petitioner the Court of Appeals resolved the problem for this Circuit. It ordered the motion to dismiss denied, "in reliance upon In Re FRIED, 161 F. 2d 453 (2 Cir.), wherein it was held that a confession obtained in violation of the privilege against self incrimination may be suppressed in advance of indictment", and it remanded the cause to this court with instructions to pass upon the merits of the motion to suppress the evidence.

The petition to suppress was heard on the merits, both peti-

2/ See discussions of the FRIED case in 56 YALE LAW REV., 1076 and 60 HARVARD LAW REV., 1145; see also annotations following In Re FRIED, 1 ALR 2d 996

tioner and the government having introduced oral and documentary evidence, and briefs were filed by counsel. Additional problems are now presented, such as the scope to be covered by the findings of this court and proper disposition of this matter, from a procedural standpoint.

The FRIED and CENTRACCHIO cases, cited above, appear to be leading cases on the subject and both were cited with approval by the Court of Appeals for the Sixth Circuit, the FRIED case in this proceeding and the CENTRACCHIO case in BENES v. CANARY, 224 F 2d 470, decided after the present case was decided.

In BENES v. CANARY, supra, the court held (p. 472):

> We are of the opinion that while the issue of unlawful search and seizure is properly raised by this proceeding and before us on this review, the competency or incompetency of the evidence obtained through appellant's claimed reliance upon the Treasury's "voluntary disclosure" policy should not be determined in a pre-indictment proceeding of this kind. Rule 41(e), Rules of Criminal Procedure, 18 U.S.C.A.; Centracchio v. Garrity.....; Chieftain Pontiac Corp. v. Julian, 1 Cir., 209 F. 2d 657; * * * The reasons for such a ruling are fully discussed in Centracchio v. Garrity, supra, and need not be repeated here. (Underscoring substituted for italics.)

Rule 41(e) is the sole statutory authority for pre-trial suppression of evidence in criminal cases but is limited to evidence obtained by means of unlawful searches and seizures under the Fourth Amendment. This rule is discussed in the CENTRACCHIO case, which, in turn, is cited in CHIEFTAIN PONTIAC CORP. v. JULIAN, supra, decided by the same court. Judge Magruder wrote the opinion of the appellate court in both cases. We quote from the CHIEFTAIN PONTIAC CORP. case, p. 659:

> In our opinion in the Centracchio case, supra, we tried

> to indicate our general lack of enthusiasm for these petitions to suppress evidence, filed at a pre-indictment stage. We are not disposed to sanction the use of such a remedy except in obedience to the clear mandate of controlling Supreme Court decisions. The leading cases are cited in our Centracchio opinion. So far as we are aware, the Supreme Court has approved of the use of pre-indictment petitions for the suppression of evidence only in cases where the evidence came into the possession of the authorities in consequence of an unlawful search and seizure forbidden by the Fourth Amendment.

At first glance it would appear that, by citing these authorities, the Court of Appeals for the Sixth Circuit approved in toto the views in those opinions and by its decision in the BENES v. CANARY case narrows its previously adopted rule as to availability of the remedy of pre-indictment suppression of evidence. It is obvious, however, that the authorities are cited only in support of the single legal principle quoted from the BENES v. CANARY case above. It should be noted, also, that unlike the present case, the CENTRACCHIO, CHIEFTAIN PONTIAC CORP., and BENES cases involve the former "voluntary disclosure" policy of the Treasury Department and that a number of courts have held in such cases that only evidentiary and not constitutional issues are presented if no more than mere reliance on such a policy is claimed.

Consistent with the principle of law just discussed, the findings of this court will be limited to those which relate to and are deemed necessary for a determination of the constitutional issue raised, though difficulty of clear-cut segregation may result in some overlapping of evidentiary and constitutional matter. In the event of another appeal, should some of the findings be considered extraneous to the constitutional issue,

they can be eliminated and the judgment modified accordingly, as was done in the BENES v. CANARY case.

THIS COURT FINDS:

Petitioner was notified by letter by Revenue Agent Krieger of the Bureau of Internal Revenue that his income tax returns for 1944, 1945 and 1946 were reviewed and that his books and records for those years would be examined to verify the information on the returns. The year 1947 was later included. Krieger was particularly interested in verifying petitioner's surgery income, because of the manner in which such income was reported.

By arrangement with petitioner, Krieger called at the clinic on December 13, 1948 and received several manila envelopes with papers which petitioner's bookkeeper stated were the records used in preparing the tax returns under investigation, but the two books, sought to be suppressed, were not included. Krieger examined the records but found them incomplete and inadequate for the purpose of verifying the returns and inquired about any additional records petitioner might have but petitioner insisted that there were no other records.

After Krieger's first visit to the clinic petitioner consulted his attorney, Waldmann, who prepared the tax returns, but was advised to seek the assistance of a tax attorney and he thereupon retained Attorney Snider, a practitioner for about 28 years who carried a Treasury card during the greater portion of those years. Snider telephoned Krieger on December 22, informed him that he represented petitioner who was too busy with his work at the hospital to be of much help in the audit, and

offered his assistance. Several conferences followed.

Krieger advised Snider that, in the absence of adequate records, he would need a net worth statement from petitioner. On the basis of a statement of assets furnished by petitioner and by application of arbitrary factors, in the absence of sufficient information, Krieger made a rough estimate of net worth from which it appeared that the income on the tax returns had been understated. Additional data was furnished from time to time and Snider kept urging Krieger to arrive at petitioner's net worth and some sort of a settlement, stating that petitioner was anxious to clear up his tax matter, but the information was still incomplete and finally, during the first week of January, 1949 Krieger informed Snider that on the basis of the records furnished, the manner in which records were maintained, and petitioner's apparent net worth, he felt that there was a possibility of a fraudulent reporting of income and that he should ask for a Special Agent of the Intelligence Unit to be assigned to the case. The Intelligence Unit is the Criminal Fraud Section of the Bureau of Internal Revenue.

Special Agent Sullivan was assigned to this case and Krieger introduced him to Snider on January 10 as the Special Agent of the Intelligence Unit. During a discussion of the case Snider agreed that there appeared to be a discrepancy between assets and reported income. A conference was arranged for January 28, at which petitioner was to be present. Petitioner was so notified by Snider and was warned that Sullivan would be present and that he was with the Intelligence Unit.

On January 28, Sullivan asked petitioner about his system of

keeping records of his income and expenses and again inquired about any additional records he might have. Snider again pressed settlement by use of the net worth method of arriving at the income and any deficiency there might be, but was told that the agents were in no position to accept any estimate of income and that in the absence of records they would have to make their own determination in the best way they could, which would mean a long and extensive investigation and would entail contacting many third persons, such as other doctors and patients. Petitioner insisted that he could be of no help to the agents at all in securing any additional records and if that was what they had to do, they should go ahead and do it. Arrangements were then made for the agents to examine the records of the Detroit Osteopathic Hospital as a source of information as to petitioner's surgery cases.

Examination of the hospital records by the agents, from February 7 to 16, inclusive, resulted in compilation of a list of some 6000 names of patients shown by the hospital admittance cards to have been admitted as petitioner's patients.

Before proceeding further with the investigation Sullivan consulted his supervisor, Grunewald, who was head of the Special Intelligence Unit, as circularization of the entire list of patients would require considerable stenographic help and use of other facilities. Grunewald authorized complete circularization and all preparations for this program were completed by about February 21, when work on the letters began.

Sullivan also received information from the Michigan Medical

Service, compiled at his request, as to insurance payments made to petitioner in surgery cases, which did not tally with that furnished by petitioner, who reported on the returns that all of his surgery income was realized from payments under insurance policies of patients.

While interviewing another doctor as to payments made to petitioner, Sullivan was referred to petitioner's secretary at the hospital for a record of payments. About a week prior to February 24, the date on which the two books were turned over, Sullivan proceeded to the hospital and there interviewed her, but she stated that there were no records. The interview took place in the lobby of the hospital which Sullivan did not deem condusive to a satisfactory interview and he thereupon informed petitioner's secretary that she would be notified when to come in to his office to make a sworn statement.

On February 23 Sullivan received a telephone call from Snider to the effect that petitioner was in his office and wanted to talk and that he also had some particular records available. Sullivan proceeded to Snider's office where petitioner informed him that he had some records which were kept at the hospital by his secretary and agreed to bring them to Snider's office on the following day.

On February 24 petitioner arrived at Snider's office with a package from which he extracted the two books and offered them to Sullivan, who instructed petitioner to give them to Snider for examination. Snider examined them and handed them to Sullivan, who asked petitioner a few questions about them, such as what the books stood for and what certain initials meant. Nothing was mentioned about the nature of petitioner's

case or the purpose for which the books were turned over, nor was there any reference at this time or at any time previous thereto about criminal prosecution or immunity from criminal prosecution.

Unknown to the agents, independent inquiries about the case were made by Snider and by the petitioner of other persons connected with the Bureau of Internal Revenue.

Snider was personally acquainted with Giles Kavanagh, then Collector of Internal Revenue at Detroit, for many years and lunched with him on occasion. Shortly after January 1, 1949 he invited Kavanagh to a luncheon at which petitioner was also present. Petitioner mentioned the letter he received from Krieger that his records would be audited and stated he might owe a tax but that he "didn't know, for sure." Snider stated that in his judgment there was a deficiency but he felt it was such that could be settled in a civil matter and that he advised petitioner that it should be settled. Kavanagh then informed them that in his opinion of the case, as they submitted it to him, he felt that petitioner's taxes could be settled and that it was just a matter of their getting together with the revenue agent to determine the amount. Petitioner saw Kavanagh at his office on one other occasion before the books were turned over. They "just talked" and Kavanagh asked him whether there were any books which he might have and could turn over, to help the government determine his tax. Petitioner promised to make a search and to turn over such records as he found.

Snider also communicated with Kavanagh and inquired whether any criminal proceedings were contemplated in this case. Kavanagh

suggested that he personally see Grunewald, head of the Intelligence Unit, and Snider followed this suggestion. He introduced himself to Grunewald, identified his client, and stated that in his opinion there was a deficiency, but no amount was mentioned. Snider testified that he did not know the amount and that it took the government several months after its investigation to ascertain it. He also testified that about the time the books were turned over the investigation was still "in the embryonic stages." In answer to Snider's inquiry Grunewald answered that as far as he was concerned, at that point, he did not think there would be any criminal prosecution. Snider could not give the exact date of this meeting but placed it closer in point of time to his employment as counsel than to the point when the books were turned over, and before Agent Sullivan made his appearance in the case. At that point the Special Intelligence Unit was not the least interested in this case, no one from that Unit was working on it, and Grunewald had no reason whatsoever for a belief that criminal prosecution of petitioner was contemplated.

From the time he was retained, Snider constantly urged petitioner to make an effort to locate records which would aid in the determination of his correct income and tax, but petitioner never revealed to Snider the fact that separate records were kept at the hospital by his secretary, at his direction, and were withheld from the agents. Even when he telephoned Snider to tell him, just prior to February 24, that he had the books for two of the four years, he did not otherwise identify them to Snider but asked whether he would "get into any trouble" if he surrendered them. Snider agreed to make inquiries.

Snider was an experienced tax attorney, thoroughly familiar with the functions, duties, and authority of the Collector, as distinguished from those of the Intelligence Unit. Kavanagh previously suggested that he direct his inquiry as to contemplated criminal prosecution to Grunewald, and he did so, at a time when no one in the Intelligence Unit was even working on the case. Yet on this occasion he sought counsel from Kavanagh, a layman, to inquire whether petitioner would be safe in turning over the books, relating to Kavanagh his conversation with petitioner. Kavanagh told Snider that he was under the impression that this was a civil and not a criminal case; that since Snider knew of the existence of the books he had no alternative but to surrender them or withdraw from the case; and that he felt it was his duty as Collector to insist that they be surrendered in the interest of getting the tax determined and paid. He also told Snider that he understood he had no authority to promise immunity from prosecution.

Petitioner complained to Snider that he was perturbed about the circularization of his patients and was apprehensive that it would be very harmful to him, and Snider inquired of Sullivan whether there was any way that he could proceed so as not to embarrass petitioner. Sullivan informed Snider that he had no authority to do otherwise.

Not long after the books were turned over Sullivan left the Intelligence Unit and Special Agent McFarlane was assigned to the case. Petitioner, about the same time, retained Attorney Cashen, who eventually filed the petition to suppress. Shortly before filing his written report on February 7, 1950 McFarlane informed Cashen that his report was

completed and that criminal prosecution was recommended therein.

On February 3, 1950 petitioner signed an affidavit charging that he surrendered the books solely upon Special Agent Sullivan's promises and agreement that he could turn over the books or any other records without any fear of prosecution. This affidavit was submitted by petitioner's counsel to an attorney in the Penal Division of the Treasury Department and that attorney summoned Sullivan, who was still with that Department but was serving in another capacity. Sullivan testified that he inquired of petitioner's counsel, at that time, why such statements were made in the affidavit and that the answer was, "If you can't attack the merits of the case, you attack the agents." This testimony was not refuted. Petitioner testified that the affidavit was 100% wrong, and his attorney assumed full responsibility for it.

The first affidavit was repudiated and on February 27, 1951 petitioner signed a second affidavit in which he makes the claim that the books were surrendered on assurances made by Collector Giles Kavanagh, to him personally and to his attorney, that there would be no criminal prosecution. He also stated therein tnat the circularization of his patients had nothing to do with the surrender of the books. Although Cashen and Attorney Platt, of Columbus, Ohio, whom petitioner retained in the meantime to assist Cashen, spent a full day with petitioner in developing the facts to be included in the affidavit, and although it is prefaced with the statement that it is true and correct in all respects, on the witness stand petitioner rated it as about 99% correct.

Conferences between petitioner's attorneys and attorneys in

the Penal Division continued, and an affidavit was later submitted from Snider, dated June 5, 1952. Prior to that date an affidavit was submitted to Snider by Cashen and he was asked whether he was willing to sign it. It gave Snider's account of the circumstances under which the books were surrendered but the information therefor was not furnished by him as he was not consulted before the affidavit was prepared. He refused to sign it until he had an opportunity to recall the facts. This was well over three years since the events to which the affidavit referred took place. Since references were made therein to his conversations with Kavanagh, he submitted the affidavit to Kavanagh who corrected certain statements imputed to him, striking out a statement that he told Snider he might be in danger of losing his Treasury card if he failed to turn over all available information, and, to a statement that Snider gained the impression that Kavanagh had ascertained from the agents that the case was not regarded as a prosecution case, adding the phrase "at that time." Other and similar corrections were also made. The affidavit was redrafted, as corrected, and was signed by Snider.

When this affidavit was presented to the Penal Division by petitioner's counsel, he was asked to furnish a statement from Kavanagh. Cashen telephoned Kavanagh at his home in northern Michigan and asked whether he would sign a statement as to his conversation with Snider just before the books were surrendered, and he agreed to do so. A statement was prepared and forwarded to him for signature and was thereafter signed and returned by him. The statement gave the gist of his conversation with Snider, as stated above.

Both Kavanagh and Grunewald were deceased at the time of the hearing on the petition.

Cashen appeared as a witness for petitioner and testified that petitioner never made a claim to him that he was promised immunity from criminal prosecution but only that he was told his case was a civil one and that he should turn over the books. He prepared and filed the petition to suppress on March 10, 1953. On March 10, the day it was dismissed on the government's motion to dismiss, an indictment for evasion of income taxes was returned against petitioner.

Evidence was submitted not only as to circumstances which led to and occurred on February 24, 1949, the day on which the books were surrendered, but as to events which followed, many of which have considerable bearing on the earlier events or on the veracity of testimony relating thereto.

Much of petitioner's testimony given on direct examination failed to withstand the test of cross-examination. There was ample evidence on which to base a conclusion that he was the trapper rather than the trapped. He reposed but little confidence in his attorneys and often kept them in complete ignorance of the true facts. On the basis of only such facts as he chose to disclose, and therefore on a hypothetical state of facts, he invited opinions from government officials, only to claim reliance on the correctness of such opinions as applied to a radically different factual situation.

With the prospect of circularization of his patients, questioning of his employees, and disclosures which these could produce, he had

little to lose and hoped he had something to gain by surrendering the books--such as settlement of his tax liability and possible forestalling of criminal prosecution thereby.

Surrender of the two books by petitioner was voluntary, uninduced by any threats, promises, or assurances, made by him directly by any agent or official of the Bureau of Internal Revenue. Kavanagh's admonition to petitioner's counsel that he must produce all records of which he had knowledge, or withdraw from the case, was not a threat against the petitioner to compel surrender of the books.

There were no promises or assurances of any kind given to petitioner through his attorney, by any responsible person in the Bureau of Internal Revenue, to compel surrender of the books. Even if any of the statements to Snider could be so construed, they were unauthorized and Kavanagh's lack of authority was well known to petitioner's counsel.

At the time the books were surrendered no criminal prosecution was, in fact, contemplated, and any inquiries which were made of government officials as to the status of the case were truthful and not misleading. Petitioner had superior knowledge of what the investigation would in the end produce, when the investigation was still in the "embryonic stages", and he had reason to believe that it would uncover substantially the same information which the withheld records contained, but by a more painful method, both to him and to the investigators. He was aided by the assistance of counsel at every step and if he was not fully advised, he alone was responsible for the situation by his failure to submit truthful information to counsel, and must bear the consequences. He cannot attribute it to any acts on the part of

government officials.

Over strong objection by the government, petitioner was permitted to introduce a letter, received by petitioner, dated March 8, 1950, determining a deficiency of $284,544.71, with penalties, for the taxable years 1944 to 1947, inclusive. Petitioner contended it was evidentiary of the fact that arrangements were made with petitioner that the books were to be turned over for the purpose of determining the civil liability and that no criminal prosecution would be undertaken, in view of Regulations of the Bureau that such a letter cannot issue until the criminal elements of a case are disposed of. The government contended that the evidence had no bearing on events occurring before the date on which the books were turned over. The evidence establishes the fact that before the so-called 90 day letter was issued a request was made of petitioner's counsel for its waiver, that petitioner's counsel agreed to communicate with petitioner and to notify the inquirer, relative thereto, and that this was not done. The regulation to which petitioner refers was no longer being applied under all circumstances and in all cases. See UNITED STATES v. QUINN, 17 F. R. D. 342, in which indictment followed adjustment and closing of the case on the tax liability. The year involved in that case is also one of those involved here.

Conclusions of Law

1. In proceedings for an order suppressing the use of evidence, the credibility of testimony is for the court. In Re FRIED, 161 F. 2d 453.

2. No fraud, trickery, or any unlawful device was used by

agents of the government in obtaining the evidence which is sought to be suppressed.

3. The evidence sought to be suppressed was not obtained in violation of any of petitioner's constitutional rights.

ORDER

The petition to suppress evidence is denied but without prejudice as to any issues on the competency or incompetency of evidence therein raised. BENES v. CANARY, 224 F. 2d 470.

s/ Arthur A. Koscinski
Arthur A. Koscinski
United States District Judge

Dated: June 15, 1956.

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In the Supreme Court of the United States

OCTOBER TERM, 1957.

No. 523

RAYMOND A. BIGGS,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI
To the United States Court of Appeals for the Sixth Circuit.

PAUL W. WALTER,
1215 Terminal Tower,
Cleveland 13, Ohio,
Attorney for Petitioner.

D. RUSK HAVERFIELD,
ROBERT L. MUSSER,
1215 Terminal Tower,
Cleveland 13, Ohio,
Of Counsel for Petitioner.

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In the Supreme Court of the United States

OCTOBER TERM, 1957.

No. ----------

RAYMOND A. BIGGS,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI
To the United States Court of Appeals for the Sixth Circuit.

To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioner, Raymond A. Biggs, respectfully petitions this Honorable Court to issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit entered July 5, 1957, which affirmed the judgment of the District Court for the Eastern District of Michigan, Southern Division.

OPINIONS BELOW.

The opinion of the Court of Appeals, Appendix p. 15, *infra*, has not yet been officially reported.

The Findings of Fact and Conclusions of Law of June 15, 1956 of the U. S. District Court for the Eastern District of Michigan, Southern Division, have not yet been officially reported, but appear at p. 308a of the Record (nine additional copies of which are filed herewith).*

* The entire printed record below certified by the Court of Appeals is for convenience hereinafter cited as "R. ."

On July 29, 1957 the Court of Appeals entered an order staying mandate for thirty days, provided however, if application for writ of certiorari were filed in the United States Supreme Court within said period, then the stay shall operate until final disposition of the case by the United States Supreme Court. On August 28, 1957, the Court of Appeals extended the stay of mandate until October 3, 1957 by amendment to the order of July 29, 1957.

JURISDICTION.

The judgment of the Court of Appeals was entered on July 5, 1957. The jurisdiction of this Court is invoked under 28 U. S. C. A., Section 1254(1).

QUESTION PRESENTED.

Does the use as evidence against the petitioner in a grand jury proceeding or criminal prosecution of information derived from certain account books, which the petitioner delivered to representatives of the Bureau of Internal Revenue upon the assurance of the then Collector of Internal Revenue that if said books were so delivered petitioner would not be prosecuted criminally, violate petitioner's right against self-incrimination guaranteed by the Fifth Amendment to the Constitution of the United States?

CONSTITUTIONAL AMENDMENT INVOLVED.

AMENDMENT V of the United States Constitution provides in pertinent part:

> * * * "nor shall be compelled in any criminal case to be a witness against himself." (U. S. C. A. 1944 ed. Vol. 1, p. 102.)

PROCEDURAL HISTORY OF THE CASE.

Petitioner filed a petition in the District Court of the United States for the Eastern District of Michigan, Southern Division, seeking to suppress certain evidence in the form of two blue Lawyers Handy Books which the petitioner claimed had been obtained from him in violation of his rights under the Fifth Amendment to the Constitution of the United States. At the time the petition was filed no indictment had as yet been returned against the petitioner although, as the petition alleged, the United States Attorney was about to present such evidence to the Grand Jury as the basis for an indictment of the petitioner for filing false and fraudulent income tax returns for the years 1946 and 1947. The prayer of the petition was that the United States Attorney and his assistants and agents be restrained from using as evidence before the Grand Jury proceeding or in any criminal prosecution of the petitioner any information obtained from petitioner's said books, and from using as evidence any information obtained directly or indirectly from or as a result of information shown in said books; and that such information be suppressed for the purpose of any such proceedings or prosecution.

The United States filed a motion to dismiss the petition on the ground that (1) the petition was lacking in equity, and (2) the issue presented was prematurely raised.

The motion was argued by counsel and, after consideration, the lower court entered an order dismissing the petition for want of equity on March 10, 1953 (R. 12a). On the same day, but after the entry of the order of the District Court dismissing the petition, an indictment was returned against petitioner charging him with attempting to defeat and evade his income taxes for the years 1946 and 1947 and those of his wife for the year 1947 (R. 2a).

Petitioner then appealed to the United States Court of Appeals for the Sixth Circuit and that Court on February 19, 1954 in Case No. 11,904 denied the government's motion to dismiss the appeal. The case was remanded to the District Court with instructions to pass upon the merits of the original petition to suppress the evidence (R. 16a).

On October 11 and 12, 1955 the District Court heard the case on the merits, both petitioner and the government having introduced oral and documentary evidence. The Court entered an order June 15, 1956 (R. 308a) denying the petition to suppress evidence, but without prejudice as to any issues on the competency or incompetency of evidence therein raised.

Petitioner then appealed to the United States Court of Appeals for the Sixth Circuit and that Court on July 5, 1957 affirmed the opinion of the court below. (Appended page 22.)

Petitioner now petitions this Honorable Court to issue a Writ of Certiorari.

SUMMARY STATEMENT OF MATTER INVOLVED.

On or about December 13, 1948 Revenue Agent Krieger had his first conference with the petitioner relative to the tax years 1944, 1945 and 1946.

Early in January 1949 the petitioner and his counsel, Mr. Snider, had a luncheon meeting with the then Collector of Internal Revenue, Giles Kavanagh, who stated that it was just a matter of getting together and determining the tax, and that "as soon as you (the petitioner) can get together with Mr. Snider and the Agent and determine the amount, why, we'll come to a settlement on the case." (R. 156a.) The Collector of Internal Revenue had meetings with petitioner on at least three other occasions, one

occasion being about two weeks before the petitioner turned over the books that are the subject of this action (R. 156a). At that meeting the petitioner asked why his patients were being circularized in view of the fact that the Collector of Internal Revenue had advised the petitioner that the tax case was purely civil. Mr. Kavanagh, the Collector of Internal Revenue, replied, "Pay no attention to it, it is purely a matter to estimate the tax, and we did it with grocers and all other types of investigation of that nature; they wrote purely as a matter to determine the amount of tax," and petitioner should not worry any more about it (R. 158a). Mr. Kavanagh asked him if he had any records he could turn over and the petitioner said he did not know, he would look around and see. Mr. Kavanagh further stated that if he would come up with any further records he should let Mr. Kavanagh know and he assured petitioner that if he did turn in any records they would not be held against him in any way, shape or form; that it was purely a civil case (R. 159a).

Following petitioner's above conversation with Mr. Kavanagh, Mr. Snider asked the petitioner on two or three occasions if he had any additional records, reminding him that he had heard Mr. Kavanagh himself say that if he turned any records over it would help bring the case to a close much quicker (R. 159a). After several conversations with Mr. Snider about the matter, petitioner advised him that if he could assure petitioner that any records he turned over would not be used to prosecute him criminally he would look to see if he could find something helpful (R. 159a). Mr. Snider said that he had that assurance from Mr. Kavanagh and the petitioner said to Mr. Snider, "If you need any consultation in this case at all, now is the time to get it." Mr. Snider replied he would let petitioner know the next day (R. 160a). The next morning he called the peti-

tioner and advised him that he would go over and talk with Mr. Kavanagh and if Mr. Kavanagh again confirmed the fact that it was only a civil case he would again call petitioner (R. 160a). Mr. Snider then went to see Mr. Kavanagh and called petitioner and told him he (Mr. Snider) had Mr. Kavanagh's assurance again, that he had been told by Mr. Kavanagh, "I've told you again, and I've told you many times this is a civil case, and if you have any records turn them in and we will quickly come to a settlement on the case." (R. 160a.)

After receiving that information from Mr. Snider, the petitioner told Mr. Snider that he had two books that he could turn in for 1946 and 1947 (being the Lawyers Handy Books involved in this action); that he had nothing for 1944 or 1945 because he did not collect the accounts at that time (R. 160a). Mr. Snider then called Mr. Kavanagh on the phone (R. 108a) and Mr. Kavanagh told him that he did not want to assume the responsibility of giving Mr. Snider an answer over the phone but stated he would inquire about the books and call Mr. Snider back (R. 108a). He did call Mr. Snider later that same day and stated to Mr. Snider, "Norm, you are now in a position where you are forced to have those books turned over, having knowledge of it, but as far as criminal prosecution is concerned, don't worry about that" (R. 109a). Mr. Snider was satisfied there would be no criminal prosecution and Mr. Kavanagh advised him (R. 109a) that unless he turned over the books or had his client turn them over he would either have to withdraw from the case or lose his Treasury card (giving him the right to practice before the Bureau).

When Mr. Snider then called petitioner he stated there would be no harm in giving the books up and that Mr. Kavanagh "even wanted me to convey to you, Doc, that there is nothing to worry about, that there would be no

criminal prosecution." (R. 110a.) Mr. Snider also stated that in addition to talking to Mr. Kavanagh and receiving his assurance, Mr. Kavanagh asked that he see Mr. Grunewald, head of the Intelligence Division, which he did (R. 115a) because Mr. Kavanagh stated to Mr. Snider that he talked to Mr. Grunewald before he advised Mr. Snider there would be no criminal prosecution if the books were turned over (R. 116a). Mr. Snider saw Mr. Grunewald prior to the time that the books were turned over (R. 117a-118a), and he stated to Mr. Snider that as far as he was concerned there would be no criminal prosecution (R. 120a). After receiving these assurances petitioner brought the books to Mr. Snider's office, laid them on Mr. Snider's desk and Agent Sullivan took possession of them. The books were turned over to the Bureau of Internal Revenue on or about February 24, 1949 (R. 157a).

On or about March 8, 1950 petitioner received a so-called 90-day statutory letter assessing the taxes (R. 57a; Petitioner's Exhibit 5, R. 291a).

In the spring of 1952 Attorneys Cashen and Platt entered negotiations with the Department of Justice in Washington and in the course of the negotiations the officials in Washington asked for a statement from Attorney Snider and later a statement from Giles Kavanagh (R. 26a, 32a). As a result, Attorney Snider prepared a rough draft of an affidavit (R. 93a) which reviewed incidents leading up to and including turning over of the books, which was introduced and received into evidence (Petitioner's Exhibit 9, R. 306a). This rough draft affidavit was taken to Giles Kavanagh to have him check the facts as set forth and to make corrections if there were any discrepancies (R. 94a). The evidence shows that Giles Kavanagh made corrections (R. 94a) on the rough draft of the affidavit in his own handwriting (R. 306a-307a), thereby confirming the

accuracy of the statements therein. The affidavit as corrected by Mr. Kavanagh was then prepared by Attorney Snider and executed by him (R. 96a, Petitioner's Exhibit 2, R. 9a, 10a). Attorney Snider's affidavit was presented to the Justice Department in Washington. After examining this affidavit the Department requested a statement from Giles Kavanagh to confirm the statements made regarding Kavanagh's part in the case at the time of turning the books over to the Government (R. 28a). A statement was then prepared which Kavanagh signed (Petitioner's Exhibit 1, R. 282a) and which was then forwarded to the Department.

Mr. Kavanagh, the former Collector of Internal Revenue, died before the petition was filed in the Court below. The statement which he signed in substance confirmed the allegation of the petition. A photostatic copy of Mr. Kavanagh's signed statement was attached to the petition and was introduced and received in evidence at the trial as Petitioner's Exhibit 1 (R. 282a). In this statement Mr. Kavanagh confirmed the fact that Mr. Snider told him about the existence of the two books and asked him whether petitioner would be safe from prosecution if the books were turned over to the agents to facilitate the determination of civil tax liability. Mr. Kavanagh was under the impression that this was a civil and not a criminal tax case and so advised Mr. Snider. He further advised Mr. Snider that he (Snider) had no alternative but to surrender the books or withdraw from the case. Mr. Kavanagh understood he had no authority to promise immunity in a criminal case. On the other hand, since the Biggs case as he saw it was merely a civil case, Mr. Kavanagh felt it was his duty as Collector to advise Mr. Snider of this fact and to insist that the books be surrendered in the interest of getting the tax determined and paid.

In the early part of March 1953 attorneys for the petitioner were notified that the petitioner's case was being submitted to the Grand Jury which resulted in the filing of the petition in this action.

REASONS FOR GRANTING THE WRIT.

1. The Court of Appeals for the Sixth Circuit has inconsistently applied rules of law in a manner that completely deprives the petitioner of his constitutional rights. Petitioner filed a pre-indictment petition to suppress evidence claimed to have been obtained by the government improperly and in violation of his constitutional privilege against self-incrimination. The District Court dismissed the petition on the basis that it was prematurely brought, reserving to petitioner the right to assert such defense upon a trial on the merits if indictment was had, relying on *Centracchio v. Garrity*, 198 F. (2d) 382 (1952). On appeal, the Court of Appeals for the Sixth Circuit reversed the District Court and remanded, relying on *In re: Fried*, 161 F. (2d) 453 (1947). On re-trial, the District Court emphatically voiced its disagreement with the order of the Court of Appeals, relying, in addition to *Centracchio v. Garrity, supra*, on *Benes v. Canary*, 224 F. (2d) 470 (1955), also decided by the Court of Appeals for the Sixth Circuit but after the decision on petitioner's prior appeal, and claimed to be inconsistent therewith. The District Court with obvious reluctance summarily entered findings of fact and conclusions of law that no unlawful device was used by the agents of the government and that the evidence sought to be suppressed was not in violation of any of petitioner's constitutional rights. On appeal of this order the Court of Appeals for the Sixth Circuit purported to reverse its position taken in the prior appeal, and in reliance upon its decision in *Benes v. Canary, supra*, the Court of Appeals states:

> "Accordingly, we are of the opinion that the appellant was not entitled to present and litigate in a pre-indictment proceeding the admissibility of the evidence involved in this case and the petition was properly dismissed as a matter of law."

Again the petitioner's constitutional rights as to the merits of his contention were summarily passed over without the careful judicial consideration required in the protection and preservation of individual rights guaranteed by the Constitution. The Court of Appeals stated:

> "However, in case we should be wrong in this conclusion (above quoted), we will briefly consider the case on its merits."

The Court of Appeals, upon obviously summary consideration, found that the findings of the District Court were not clearly erroneous and its judgment was affirmed.

The apparent result of the erroneous judgment of the Court of Appeals sought to be reviewed is that petitioner has been deprived of a realistic judicial consideration of the merits of his claim of violation of his constitutional rights. It is clear that both the District Court and the Court of Appeals felt that petitioner's petition should be dismissed on procedural grounds as prematurely brought, and therefore gave scant attention to evaluation of the evidence pertaining to the merits of petitioner's claim. Nevertheless, the decision of the District Court and the affirmance by the Court of Appeals specifically determines that petitioner's rights have not been violated, and thereby presumably renders such issue *res adjudicata* and precludes a later proper consideration of the evidence relative thereto.

2. Both the Court of Appeals and the District Court erroneously considered this case as one of the many cases in the category testing the validity of the Treasury De-

partment's so-called "voluntary disclosure" policy. All of the cases primarily relied upon and considered as dispositive of the instant case, namely, *Centracchio v. Garrity, supra, Benes v. Canary, supra,* and *Chieftain Pontiac Corp. v. Julian,* 209 F. (2d) 657 (1954), were "voluntary disclosure" policy cases. These cases are basically and fundamentally different from petitioner's case. The Treasury Department published and announced that as a matter of policy it would not recommend criminal prosecution of any taxpayer who voluntarily came in *before* an investigation and disclosed the filing of an erroneous tax return, followed by a correction thereof and payment of any tax deficiency. Many cases arose as a result of this policy (since revoked), including those above cited and relied upon by the District Court and Court of Appeals. In these cases the issues centered around the timeliness and adequacy of the disclosure, as well as legal validity of the policy itself as presenting a defense to a criminal prosecution. The contention of defendants in these cases was that their disclosure was voluntary only to the extent induced by the announced Treasury Department policy, and the use of the disclosed information in criminal prosecution violated their right against self-incrimination. The good faith of the defendants in availing themselves of the Treasury Department policy weighed heavily in the consideration of such cases by the courts.

Petitioner makes no claim of reliance upon the "voluntary disclosure" policy. The entire and uncontradicted evidence in this case shows that such policy had no applicability. The books surrendered by petitioner were produced long *after* the investigation was under way and during the course thereof after many conferences with the Revenue Bureau examiners. These books were produced as a direct result of specific and personal representations

made to him and his attorney that no criminal action was involved; that the books were to be used for the purpose of expediting completion of the examination and assessing the civil liability, if any. The issues and applicable legal principles in petitioner's case and those in the "voluntary disclosure" cases are entirely different, and the District Court and the Court of Appeals substantially erred in not recognizing such distinction and in disposing of petitioner's case on the same considerations prevailing in the "voluntary disclosure" cases.

3. Were the petitioner's case to be considered as being controlled by the same legal principles as prevailing in the "voluntary disclosure" cases, it is to be noted that there is a conflict among the decisions of the several Courts of Appeals as to whether the taxpayer's constitutional rights are violated by using information so disclosed in a criminal proceeding. *Centracchio v. Garrity*, *supra*, and *Benes v. Canary*, *supra*, take the position that no constitutional right is violated by such use. To the contrary, *U. S. v. Shotwell Mfg. Co.*, 225 F. (2d) 394 (1955), held that such use of voluntarily disclosed information violated taxpayer's constitutional rights. The question of taxpayers' constitutional rights in such situation is one of great importance and widespread prevalence, and in great need of determination by the Supreme Court so that the sacred rights of citizens protected by our Constitution may be preserved. The conflict in the decisions by the several Courts of Appeals should be resolved by the Supreme Court in order to lend certainty in this controversial field of law.

4. We have hereinbefore pointed out the lack of realistic judicial consideration of the evidence in this case. This results in part from the apparent feeling of both the District Court and the Court of Appeals that petitioner's

original petition should be dismissed as a procedural matter because of being prematurely brought, and hence slight attention was given to a weighing and evaluating of the evidence. When coupled with an erroneous viewing of the evidence in the light of the rules and legal principles applicable to "voluntary disclosure" cases without distinguishing such cases from the basically different type of case presented by petitioner's original petition, an almost total lack of proper judicial determination of pertinent facts inevitably results. In such circumstance, the petitioner's constitutional rights are effectually denied without judicial process, and the findings of fact and conclusion of law cannot be said to be properly founded. Such error is compounded by the finding of the Court of Appeals that the findings of the District Court were not "clearly erroneous." The enormity of prejudice to petitioner's rights by such casual consideration of the evidence is disclosed by the ignoring of the controlling and most persuasive, impartial, uncontradicted and written evidence adduced at the trial before the District Court, namely, the affidavit of Giles Kavanagh, Collector of Internal Revenue (Petitioner's Exhibit No. 1, R. 282a) and his further handwritten correction of Snider's affidavit draft (Petitioner's Exhibit No. 9, R. 306a). This evidence in and of itself shows the inference of promised immunity: the representation of use in civil proceedings only of the requested books, causing the petitioner to surrender his records only for the represented purpose of civil settlement after refusal to disclose possibly self-incriminating records for use in any criminal action; and the added force and pressure of threatening petitioner with the forced withdrawal of his attorney from further representation. In the light of such evidence, it is inconceivable that the District Court could conclude that the constitutional rights of petitioner

were not violated. The decision of the Court of Appeals that such conclusion was not "clearly erroneous" further demonstrates the extent of prejudice to petitioner's rights guaranteed by the Constitution. The error of such judgment is so apparent and substantial that the intervention of the Supreme Court is required and merited that so great a threatened miscarriage of justice is avoided and the constitutional protection of our citizenry assured.

CONCLUSION.

For the reasons above indicated, it is respectfully suggested that in the exercise of sound judicial discretion, this petition for a writ of certiorari should be granted.

Respectfully submitted,

PAUL W. WALTER,
1215 Terminal Tower,
Cleveland 13, Ohio,
Attorney for Petitioner.

D. RUSK HAVERFIELD,
ROBERT L. MUSSER,
1215 Terminal Tower,
Cleveland 13, Ohio,
Of Counsel for Petitioner.

APPENDIX.

OPINION OF THE UNITED STATES COURT OF APPEALS.

(Decided July 5, 1957.)

Before: SIMONS, Chief Judge, ALLEN and MILLER, Circuit Judges.

MILLER, Circuit Judge. The appellant, Raymond A. Biggs, filed a petition in the District Court seeking to suppress certain documentary evidence which the petition claims was obtained from him in violation of his rights guaranteed under the Fifth Amendment to the Constitution of the United States which provides that no person "shall be compelled in any criminal case to be a witness against himself." It was alleged that the District Attorney intended to present to the Grand Jury the evidence so obtained in order to obtain an indictment against the appellant for violation of the Internal Revenue Laws in the filing of income tax returns for the years 1946 and 1947.

The petition alleged that about the middle of February 1949 a revenue agent and a special agent of the Intelligence Unit of the Bureau of Internal Revenue, who were investigating the income tax affairs of the appellant, requested permission to examine appellant's records showing the amount of fees received by him during the taxable years of 1946 and 1947; that appellant, after consulting his attorney, informed his attorney that he would not under any circumstances turn over certain books that he had, showing records of professional receipts for the years in question unless he had absolute assurance that he would not be prosecuted for violation of any laws of the United States; that appellant's attorney so informed Giles Kavanagh, the then Collector of Internal Revenue at Detroit, Michigan, who after looking into the matter, advised the attorney that the Government did not consider appellant's

case an appropriate one for prosecution and that appellant would be safe turning over his books in order to facilitate the determination and payment of appellant's tax liability; that appellant, upon being advised by his attorney of this assurance, delivered to the Internal Revenue Agent and Special Agent investigating the case, two Lawyer's Handy Books, one for 1946 and the other for 1947, which contained the names of patients and the amounts collected day by day during those years; that after obtaining such books the investigating agents used the information contained therein as a basis for a recommendation of prosecution of the appellant; and that said information was turned over to the United States Attorney who intended to present it to the Grand Jury as a basis for an indictment to be returned against the appellant. The petition prayed that an order be entered restraining the United States Attorney from using as evidence before the Grand Jury or in any criminal prosecution of the appellant, the said books of the appellant or any information obtained directly or indirectly from the books, and that the books and any information obtained from them be suppressed as evidence in any criminal prosecution of the appellant. Appellant filed in support of the petition Exhibit "A," being the affidavit of his attorney, and Exhibit "B," being a statement of Giles Kavanagh, since deceased.

The Government filed a motion to dismiss the petition on the grounds (1) that the petition was lacking in equity and (2) that the issue was prematurely raised.

The District Judge was of the opinion, in accordance with the views expressed in *Centracchio v. Garrity*, 198 F. (2) 382, C. A. 1st, cert. denied, 344 U. S. 866, that there was no authority sanctioning judicial interference of this nature with the action of a United States Attorney in the administration of criminal law, *at a pre-indictment* stage,

in other than search and seizure cases, and dismissed the petition for want of equity. On the same day, but after the entry of the order, an indictment was returned against appellant for income tax violations for the years 1946 and 1947.

On appeal to this Court from the order dismissing the petition, an order was entered on February 19, 1954, denying the Government's motion to dismiss the appeal, reliance being placed upon *In re: Fried*, 161 F. (2) 453, C. A. 2nd, cert. granted, 331 U. S. 804, writ dismissed on motion of counsel for the petitioner, 332 U. S. 807. The cause was remanded to the District Court with instructions to pass upon the merits of the motion.

Following the hearing in the District Court, the District Court ruled that the evidence sought to be suppressed was not obtained in violation of any of petitioner's constitutional rights and denied the petition to suppress, but without prejudice to petitioner's right to challenge at the trial the competency or incompetency of the evidence sought to be suppressed. The case is again before us on this second appeal.

Since our order of February 19, 1954, on the prior appeal, we have had presented to us and ruled upon the general question of pre-indictment motions to suppress evidence. *Benes v. Canary*, 224 F. (2) 470, C. A. 6th, cert. denied, 350 U. S. 913. In that case we cited with approval *Centracchio v. Garrity*, *supra*, and *Chieftain Pontiac Corp. v. Julian*, 209 F. (2) 657, C. A. 1st, which hold that under Rule 41(e), Federal Rules of Criminal Procedure pre-indictment petitions for the suppression of evidence are authorized only in cases where the evidence comes into the possession of the authorities in consequence of an unlawful search and seizure forbidden by the Fourth Amendment. We ruled as premature and refused to consider so much

of the motion to suppress in that case as was based upon the contention that the evidence had been improperly obtained by the Government through reliance by the petitioning taxpayer upon the Treasury's "voluntary disclosure" policy, which the Government, after obtaining the evidence, was not adhering to. The issues in that case and the present case are analogous.

The Second Circuit in *In re: Fried, supra*, makes an exception to the general rule, approved by us in *Benes v. Canary, supra*, by broadening the scope of pre-indictment petitions to suppress to include cases involving violations of constitutional rights under the Fifth Amendment as well as under the Fourth Amendment. The three separate opinions of the three members of the Court indicate the restricted type of case to which the exception was made applicable, one member of the Court approving the exception only in cases involving a violation of the petitioner's constitutional rights under the Fifth Amendment, and another member of the Court refusing to approve the exception even in its restricted application. That case involved a confession obtained by threats of physical violence and "third degree" police methods, a factual situation far different from the one disclosed in this case. See also: *United States v. Sineiro*, 190 F. (2) 397, 193 F. (2) 136, C. A. 3rd, cert. denied, 343 U. S. 904.

Since the exception made to the general rule in *In re: Fried, supra*, is limited to cases involving petitioner's constitutional rights under the Fifth Amendment, there may be considerable doubt of its applicability to the present case. Accepting the allegations in appellant's petition at their face value, the evidence may be inadmissible but not because it involves a violation of constitutional rights. *Chieftain Pontiac Corp. v Julian, supra*, 209 F. (2) 657, 659-660, C. A. 1st; *Brink v. United States*, 148 F. (2) 325, 328, C. A. 6th; *United States v. Klapholz*, 230 F. (2) 494,

496-497, C. A. 2nd, cert. denied, 351 U. S. 924. Compare: *McNabb v. United States*, 318 U. S. 332; *Upshaw v. United States*, 335 U. S. 410; *Nardone v. United States*, 302 U. S. 379, where incriminating statements made by the defendants were held inadmissible because of statutory violations rather than on constitutional grounds, and *Sorrells v. United States*, 287 U. S. 435, involving the defense of entrapment. Actually, it is questionable whether the petitioner can even successfully prevent the use of such evidence when it is offered at the trial. *Olmstead v. United States*, 277 U. S. 438, 468; *Grimm v. United States*, 156 U. S. 604, 610; *On Lee v. United States*, 343 U. S. 747, 757-758; *Goldman v. United States*, 316 U. S. 129, 135; *Whiskey cases*, 9 Otto 594; *Wellmann v. United States*, 227 F. (2) 757, 770, C. A. 6th; *O'Malley v. United States*, 128 F. (2) 676, 684-685, C. A. 8th; *Mattes v. United States*, 79 F. (2) 127, C. A. 3rd. See: *Irvine v. California*, 347 U. S. 128, 134-135. However, we do not here attempt to answer such questions, but merely refer to them as part of the background against which our question must be considered.

There is no attempt in the present case to deprive the appellant of any rights which he might have to prevent the use of evidence complained of in the prosecution of the pending indictment against him. It is a question of procedure rather than one of substantive law. When and in what manner the objection to its use is to be made is the question involved.

We think this question is controlled by Rule 41(e), Federal Rules of Criminal Procedure. There, dealing with motions to suppress evidence before trial the procedure is limited to evidence obtained by unlawful search and seizure, involving the Fourth Amendment. Questions involving the Fifth Amendment are not included. The reasons for not including questions involving self-incrimination under the Fifth Amendment are well explained in *Centrac-*

chio v. Garrity, supra, and in the concurring and dissenting opinions in *In re: Fried, supra.* As pointed out in the opinions in those cases it seems reasonable to conclude that the failure of the rule to make any provision for the suppression of confessions before trial meant that it was intended that such questions, similar to questions about the competency of other evidence, be dealt with at the trial by the tribunal before which they were sought to be introduced. If it is advisable that the rule be broadened in scope, it should be accomplished through the authorized procedure for amending the rules, rather than by judicial decision. The Supreme Court has not indicated its approval of such an amendment or of the construction given to the rule by *In re: Fried, supra.* Accordingly, we are of the opinion that the appellant was not entitled to present and litigate in a pre-indictment proceeding the admissibility of the evidence involved in this case and the petition was properly dismissed as a matter of law.

However, in case we should be wrong in this conclusion, we will briefly consider the case on its merits. Appellant is, of course, entitled to the protection afforded him by the Fifth Amendment. If the books were delivered by him to the government agents involuntarily, such as by reason of force or intimidation, they can not be used as evidence against him. *In re: Fried, supra,* 161 F. (2) 453, C. A. 2nd; *United States v. Abrams,* 230 F. 313, D. C. Vt.; *United States v. Wolrich,* 129 F. Supp. 528, S. D., N. Y. Appellant contends that the same rule is applicable if he made a voluntary disclosure in reliance upon promises of immunity from criminal prosecution. *United States v. Shotwell Manufacturing Co.,* 225 F. (2) 394, 406, C. A. 7th; *In re: Liebster,* 91 F. Supp. 814, E. D. Pa. See: *Brink v. United States, supra* 148 F. (2) 325, 328, C. A. 6th; *Centracchio v. Garrity, supra,* 198 F. (2) 382, 388, C. A.

1st; *McNabb v. United States, supra,* 318 U. S. 332, 341. Compare: *United States v. Shotwell Manufacturing Co., supra,* 225 F. (2) 394, dissenting opinion at page 406. It was unnecessary for us to rule on the question in *Benes v. Canary, supra,* 224 F. (2) 470, 473, C. A. 6th. Assuming, without deciding, that the contention is well taken, we are nevertheless of the opinion that the judgment should be affirmed.

It is settled law that the privilege against self-incrimination does not preclude the admission into evidence of documents voluntarily given to a revenue agent in a civil tax investigation without promise of immunity and in the absence of fraud or misrepresentation, even though the taxpayer did not anticipate criminal prosecution. *White v. United States,* 194 F. (2) 215, C. A. 5th; *United States v. Wolrich,* 119 F. Supp. 538, S. D. N. Y.; *Moyer v. Brownell,* 137 F. Supp. 594, 608-610, E. D. Pa.

Whether the books were voluntarily surrendered by the appellant or were obtained under a promise of immunity or through fraud or misrepresentation on the part of the Government is a question of fact. The District Judge in his opinion reviewed the evidence in detail and found that the surrender of the two books by petitioner was voluntary, uninduced by any threats, promises or assurances made to him directly by any agent or official of the Bureau of Internal Revenue and that no fraud, trickery or any unlawful device was used by agents of the government in obtaining the evidence which is sought to be suppressed. These findings are not clearly erroneous, and must be accepted on this appeal. Based on these findings, the District Court's ruling that the evidence sought to be suppressed was not obtained in violation of any of petitioner's constitutional rights, is not erroneous.

The judgment is affirmed.

JUDGMENT OF THE COURT OF APPEALS.

(Filed July 5, 1957.)

Appeal from the United States District Court for the Eastern District of Michigan.

This cause came on to be heard on the transcript of the record from the United States District Court for the Eastern District of Michigan, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby affirmed.

In the Supreme Court of the United States

OCTOBER TERM, 1957.

No. 523.

RAYMOND A. BIGGS,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

REPLY BRIEF OF PETITIONER.

PAUL W. WALTER,
1215 Terminal Tower,
Cleveland 13, Ohio,
Attorney for Petitioner.

D. RUSK HAVERFIELD,
ROBERT L. MUSSER,
1215 Terminal Tower,
Cleveland 13, Ohio,
Of Counsel for Petitioner.

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In the Supreme Court of the United States

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

REPLY BRIEF OF PETITIONER.

The general public interest in the problem of tax fraud investigations and the need for clarifying Constitutional procedures in regard thereto is indicated by an article appearing in the American Bar Association Journal for November 1957, Vo. 43, page 1009, in which Warren V. Ludlam, Jr. of the Mississippi Bar sets forth the problem which confronts the citizen in his relationship with the Internal Revenue Service and emphasizes the need for the meticulous examination by the courts of each case and a determination by the courts as to the Constitutional rights of the citizen in this relationship so that the citizen may be fully protected by the courts.

For the convenience of the Court a copy of the article is reprinted herein in full.

TAX FRAUD INVESTIGATIONS: A PLEA FOR CONSTITUTIONAL PROCEDURES

BY WARREN V. LUDLAM, JR., *of the Mississippi Bar (Jackson)*

[The administration of a tax system that collects billions of dollars annually is a complex and perplexing job, and our traditions require that it be done with full respect for the rights of the taxpayers. The Bureau of Internal Revenue has thousands of hard-working, competent men and women who are scrupulous in their regard for these rights. Mr. Ludlam writes not about these, but about a small number of Internal Revenue agents who, in their zeal to collect taxes, sometimes resort to practices that, if not illegal, are certainly questionable. Mr. Ludlam discusses such practices and urges both the courts and the Internal Revenue Service itself to pay scrupulous attention to the problem.]

The construction and application of the constitutional immunities from unreasonable search and seizure and self-incrimination in the comparatively new and special situations involved in rapidly increasing tax fraud prosecutions warrants a most critical appraisal. The investigative procedures utilized by the Internal Revenue Service and the ignorance of such procedures by taxpayers are the salient features of a factual background in which insidious encroachments upon these basic rights are both easy and likely. Judicial recognition of deviations, often slight in their incipiency, and adequate protection against such impairment, can be obtained only through both an adherence to the substance of those fundamental rights and a full understanding of the investigative techniques of the Internal Revenue Service by both the Bar and the judiciary.

In a number of recent criminal income tax fraud cases, the defendant-taxpayers have contended that the

Special Agents of the Internal Revenue Service obtained vital information from the taxpayers by concealment or misrepresentation; that the giving of the information was involuntary and that the information thus obtained should be suppressed or excluded from evidence. The obtaining of criminal evidence from taxpayers under investigation in such a manner is made the subject of this article[1] not because it is thought that such practices are as yet widespread among Special Agents[2] or because it is thought that the Internal Revenue Service condones such practices, but solely as a warning that such practices by the Special Agents do occur occasionally and that their status is still unsettled. Moreover, if such practices are permitted to continue and are not dealt with firmly by the Internal Revenue Service and the courts, they can lead to a nullification of the constitutional immunities, guaranteed by the Fourth and Fifth Amendments, insofar as tax evasion cases are concerned.

The Service is charged with the duties of making both civil and criminal investigations of taxpayers in the enforcement of the income tax laws.[3] Routine income tax examinations, which are civil investigations for the purpose of determining the correct income taxes, interest

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1. The author acknowledges the assistance given in the preparation of this article by Clifford C. Chittim, of the Colorado and Mississippi Bars.

2. However, there is a possibility that the occurrences of such practices by Special Agents are increasing. At a seminar on "Techniques of Handling a Fraud Case," held November 12, 1956, in New York City in connection with New York University's Fifteenth Annual Institute on Federal Taxation, a number of attorneys indicated they are now handling one or more cases involving questions of concealment or misrepresentation by the Special Agents.

3. Because of space limitations, the next seven paragraphs have not been footnoted, since the information contained therein is generally known by tax practitioners.

and certain civil penalties due, are made by persons, usually referred to as "Revenue Agents," who are attached to the Audit Division in the District Director's office. These routine income tax examinations are commonly referred to by government agents, tax practitioners (both lawyers and accountants) and taxpayers as "audits," "routine checks," "routine investigations," and "routine examinations." To the average taxpayer who has never knowingly been investigated for criminal tax evasions, each of these terms, when used by a government agent, implies that the investigation, beginning or in progress, is solely for determining the correct tax due and certainly carries no connotation of a criminal investigation. On the other hand, whenever income tax fraud is suspected or found, the criminal investigation, for the purpose of determining whether the evidence will support a criminal prosecution and working up such evidence is conducted by persons usually referred to as "Special Agents," who are attached to the Intelligence Division in the District Director's office. When fraud is suspected or found, the Intelligence Division usually assigns a Special Agent to conduct a joint investigation with a Revenue Agent, the Special Agent's principal function being to find evidence which will show whether or not the criminal tax evasion laws have been violated and to collect such evidence and the Revenue Agent's principal function being to determine the correct income tax due. The Intelligence and Audit Divisions are separate units within the District Director's office and, in the main, have different and separate duties, functions and purposes. However, this existence of two different types of investigative agents and this difference in their functions are not generally known or understood by the average taxpayer. Many taxpayers think of all agents (whether they introduce themselves as Revenue

Agents or Special Agents), as Revenue Agents, who have appeared to determine the correct income tax—not to conduct a criminal investigation. There is substantial evidence that some think that all criminal investigations, pertaining to all federal criminal laws, including the criminal statutes of the revenue laws, are conducted solely by the FBI. Rarely are any of them aware beforehand that the Special Agent is also a criminal investigator. The Special Agent does not wear a uniform, as does the city policeman; nor does the introduction of a person as a "Special Agent" convey to the average person any suggestion of a criminal investigation as is prompted by the introduction of a non-uniformed person as a "detective" or "FBI Man." This lack of knowledge or this misconception by the average taxpayer is one reason why certain subterfuges or misrepresentations, occasionally attempted by Special Agents, should be dealt with strongly by the courts under the Fourth and Fifth Amendments.

In each investigation, the Special Agent, either at the beginning or during its course, usually wants to examine the taxpayer's books and records and to obtain information from the taxpayer. The Fourth Amendment protects "the people * * * in their persons, houses, papers and effects, against unreasonable searches and seizures. * * *." The Fifth Amendment, the constitutional guarantee against compulsory self-incrimination, provides that no person "* * * shall be compelled in any criminal case to be a witness against himself. * * *." In recognition of these constitutional guarantees, the Service has for a long time had a firm policy that, until it decides against criminal prosecution, it will not issue a summons to the taxpayer for his records under the Code sections pertaining to compulsory production of records and testimony. Hence, the Special Agent either *asks* the taxpayer, frankly and fairly, for the

books and information or occasionally gets them from the taxpayer under circumstances, which to say the least are questionable, and some of which cannot be described as anything but subterfuge or misrepresentation. It is these questionable circumstances and the special issues arising from them with which we are here dealing.

The special issues may arise in some variation of either of two situations:

Situation No. 1: In the more common situation, the Revenue Agent begins an examination routine in character and so advises the taxpayer. He requests permission of the taxpayer to examine his books and records and requests of him other information in an oral or other informal manner, all of which taxpayer will probably freely give. Later, upon development of suspicion of fraud, a Special Agent enters the case. His participation may be concealed, his identity may or may not be revealed, or it may be concealed by introducing him as a fellow revenue agent. The Revenue Agent (or the Special Agent) may thereafter make further repeated assertions that this is only a "routine check." In any case, the taxpayer is not advised of the changed character of the investigation. It is not until later in the investigation, if at all (probably not until a formal questioning), that the taxpayer is warned that anything he says may be used against him.

Situation No. 2: In the second factual situation, fraud is suspected before the investigation begins, and a Special Agent, alone or jointly with a Revenue Agent, begins an investigation for the purpose of determining whether there is evidence which will support criminal prosecution. The Special Agent may or may not identify himself as a Special Agent; he explains that the returns of the taxpayer have been assigned to him for investigation, but carefully re-

frains from disclosing the criminal character of the investigation. If the Special Agent does not present himself, then he works through a Revenue Agent, who alone appears to the taxpayer and fronts for the Special Agent. Here again, in some instances, the taxpayer is advised by the Special Agent or the Revenue Agent that the examination is purely routine and civil in character, or that it is a "routine check." At some point in the investigation, a request is made of the taxpayer for the opportunity to examine his books and records and for other information, in an oral or other informal manner, from the taxpayer. Later, the Special Agent, in conversation with the taxpayer, may advise him of some discrepancies which he would like to discuss, and that he doesn't have to answer any question he doesn't want to; but, here again, this is usually not done until a formal questioning.

The Special Agent, no matter at what point he enters the investigation, knows that his sole task (at that point) is to determine whether there is evidence of income tax evasion sufficient to justify his recommendation for criminal prosecution and to assure the availability of such evidence at a trial. Only after he has decided not to recommend criminal prosecution does he determine whether the evidence warrants a recommendation for the assessment of the 50 per cent civil fraud penalties.

In either situation, the affirmative acts of concealment of the presence in the investigation of the Special Agent, or the affirmative (whether expressed or implied) misrepresentations of the Special Agent's identity or the criminal character of the investigation are done for one principal purpose—to secure records and information which he fears will not be supplied if he makes a full disclosure of his identity and purpose. Nevertheless, in the event of a prosecution, the Special Agent will probably be

permitted to testify to any oral statements or admissions secured from the taxpayer under these circumstances.

How have the courts reacted to these situations in income tax fraud prosecutions?

The courts have generally applied, in determining whether statements made by the taxpayer or information obtained from his books and records are admissible, the principle announced by the Supreme Court in *Wilson v. United States*[4] that the true test of admissibility of statements is whether they are "made freely, voluntarily and without compulsion or inducement of any sort." Sometimes the test is expressed as whether "voluntarily and understandingly given."[5] Under either definition the courts are in fairly uniform agreement that a "constitutional warning" is not a necessary prerequisite of a "voluntary" statement.

In the absence of an expressed, clear promise of immunity, the courts have developed no uniform pattern of treatment of the situations described. (a) Two have suppressed the illegally obtained evidence as a matter of law; (b) some have admitted the evidence as a matter of law, despite the Special Agent's methods; (c) some, while refusing to exclude the evidence as a matter of law, permit the circumstances under which it was secured to go to the jury for their determination of the weight and credibility to be accorded such evidence.[6]

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4. 162 U. S. 613, 623 (1896).

5. *Turner v. United States*, 222 F. 2d 926, 931 (4th Cir. 1955), *cert. den.* 350 U. S. 831 (1955).

6. Omitted from consideration under this category are cases such as *Smith v. United States*, 348 U. S. 147 (1954), in which, because of conflicting evidence, the net worth statement and the circumstances under which it was supplied to the agent were submitted to the jury under an instruction to reject the statement and all the evidence obtained through it if "trickery, fraud or deceit" were practiced on the defendant or his accountant.

To secure the full protection afforded by the "(a)" line of decisions, the taxpayer has had to bring his case within one or more of the stereotyped forms of fraud or deceit. Until the "voluntary disclosure" policy was abandoned by the Treasury Department, evidence secured through a voluntary disclosure prior to the initiation of an investigation, in reliance upon the Treasury's promise of immunity, was commonly suppressed.[7] Despite the number of recent cases in which the Special Agent's activities were questionable. *United States v. Lipshitz*[8] and *United States v. Wheeler*[9] stand as the only cases in which the evidence, not induced by an express promise of immunity, was suppressed as a matter of law. The conduct of the Special Agent, in the *Lipshitz* case, without revealing to the taxpayer his presence in the examination, in directing from his office the Revenue Agent in the accumulation of evidence far beyond the scope of the customary routine audit was characterized by the Court as not appreciably different from "stealth or subterfuge."

In the *Wheeler* case, evidence of income tax evasion, secured from an examination of the taxpayer's books and records by an Internal Revenue Agent, under the pretext of a routine examination, the real purpose of which was to determine whether the taxpayer had engaged in any criminal activities with employees of the Internal Revenue Service, was suppressed. The court held that this was fraud or deceit perpetrated on the taxpayer at the inception of the investigation and held that it rendered nugatory the taxpayer's consent to the examination.

The "(b)" line of decisions, at the other extreme, hold, as a matter of law, that in the absence of an express

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7. *In re Liebster*, 91 F. Supp. 814 (E. D. Pa. 1950).
8. 132 F. Supp. 519 (E. D. N. Y. 1955).
9. 149 F. Supp. 445 (W. D. Pa. 1957).

representation that only civil liability will be considered, the failure to disclose the criminal nature of the investigation does not render the evidence inadmissible.[10] Nor, is the rule modified by a conflict in the evidence as to whether the Special Agent disclosed his identity;[11] or by the fact that from the outset the search was for evidence of crime; [12] or by the conduct of a Revenue Agent, after completion of the routine examination, in introducing a Special Agent as a "fellow Revenue Agent" and proceeding with a criminal examination under the pretext of verifying a transaction he had overlooked.[13]

In the *Wolrich* case,[14] it is implied that the test is whether the representations made (the Revenue Agent stated that it was a "routine audit") amount to a promise of immunity. But it is submitted that the real test is whether the information was "voluntarily given"; that a promise of immunity, however, expressed or implied, is only evidence going to the "voluntary" question; and that even though an implied promise of immunity cannot be found, nevertheless there are other concealments and misrepresentations which can be made by the Special Agents, which make the giving of the information by the taxpayer "involuntary."

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10. *Blumberg v. United States*, 222 F. 2d 496 (5th Cir. 1955); *Scanlon v. United States*, 223 F. 2d 382 (1st Cir. 1955).

11. *United States v. Achilli*, 234 F. 2d 797 (7th Cir. 1956), certiorari granted on an entirely different issue, — U. S. —, 1 L. ed. 2d 595, 663; *affd.* 353 U. S. —, 1 L. ed. 2d 918 (1957).

12. *Turner v. United States*, *supra* note 5.

13. *United States v. Wolrich*, 119 F. Supp. 538 (S. D. N. Y. 1954), but compare the court's subsequent opinion on motion for reargument of motion to suppress evidence in 129 F. Supp. 528 (1955), in which the court ordered a rehearing on the question whether taxpayer's consent to the examination of his books and records was obtained by fraud by the Revenue Agent.

14. *Ibid.*

Under the "(c)" line of decisions, in variant factual situations, the courts have held that the circumstances under which records and admissions were obtained were insufficient to warrant their exclusion from evidence as involuntary, as a matter of law, but that such circumstances were matters which went to the weight or credibility of the evidence. This disposition has been made where, after the initiation of a routine examination of which the taxpayer was advised, a Special Agent entered the case to secure evidence of crime, without disclosing to the taxpayer the changed character of the investigation,[15] and without disclosing his identity.[16] Likewise, it has been utilized where the Revenue Agent and Special Agent at the outset of the examination in search of criminal evidence represent and subsequently repeat that the examination is purely civil.[17]

The "(c)" approach conceivably could work to the advantage of a skilled defense counsel, by affording to him the opportunity for full jury consideration of questionable investigative procedures which reflect upon the government's case. However, as a means of protection against invasion of constitutional rights, it has serious limitations. First, the members of the jury, not being judicially trained, are subject to the greater temptation to consider first the question of guilt rather than the weight or credibility of particular pieces of evidence, and, if the former looks bad for the defendant, then approach the weight and credibility of particular portions of the evidence with a mind already deeply impressed with defend-

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15. *Lloyd v. United States*, 226 F. 2d 9 (5th Cir., 1955).

16. *United States v. Guerrina*, 126 F. Supp. 609 (E. D. Pa. 1955).

17. *Montgomery v. United States*, 203 F. 2d 887 (5th Cir. 1953).

ant's guilt. Secondly, assuming that the jury finds that evidence was involuntarily given, there is a real peril, especially in net worth cases, that it will not be able to identify accurately the illegally secured evidence and the other information obtained as a result of it by the Special Agent.

A comparison of the *Lipshitz*,[18] *Wolrich*,[19] and *Guerrina*[20] cases demonstrates the lack of uniformity among the courts in dealing with these situations. They differ in their specific facts, but their substance is hard to distinguish; yet each court resolved the special issue in a different way. *Lipshitz* was an "(a)" decision (i.e., evidence suppressed as a matter of law); *Wolrich* was a "(b)" decision (i.e., evidence admitted as a matter of law); and *Guerrina*, originally an "(a)" decision was, on reconsideration, turned into a "(c)" decision (evidence admitted for jury to determine weight and credibility).

Thus, the cases show that Special Agents do occasionally resort to subterfuge and are employing investigational techniques, which, because of the average taxpayer's limited knowledge about Special Agents, are questionable as deceit or fraud.

A practical conclusion is that, until these questionable techniques are brought within control by either the Service itself or by the courts, in *any* revenue investigation, even before it appears that the investigation is a criminal one, the taxpayer, at the beginning, should have the advice of a tax attorney, versed in constitutional and criminal law. In too many cases today constitutional rights have unwittingly been nullified by the taxpayer and his advisers

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18. *Supra*, note 8.
19. *Supra*, note 13.
20. *Supra*, note 16.

before an attorney is consulted. Attorneys and accountants should agree on procedures that will assure better protection of these valuable rights.

It is also obvious that the Internal Revenue Service needs to reform some of its investigational techniques. To maintain its own self respect and the people's faith in our revenue system, the Service should adopt new investigational policies and techniques, which will eliminate such questions, and should fully inform the people of its procedures and its Intelligence Division.

But, until such reforms occur, it is hoped that the courts will take a closer look at these situations and these questionable investigational techniques in the light of the Fourth and Fifth Amendments.

CONCLUSION.

For the reasons indicated in the petition for writ of certiorari, and as indicated in the foregoing article, it is respectfully suggested that in the exercise of sound judicial discretion, the petition for a writ of certiorari should be granted.

Respectfully submitted.

PAUL W. WALTER,
1215 Terminal Tower,
Cleveland 13, Ohio,
Attorney for Petitioner.

D. RUSK HAVERFIELD,
ROBERT L. MUSSER,
1215 Terminal Tower,
Cleveland 13, Ohio,
Of Counsel for Petitioner.

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In the Supreme Court of the United States

October Term, 1957

No. 523

RAYMOND A. BIGGS, PETITIONER

v.

UNITED STATES OF AMERICA

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The District Court's opinion, findings of facts and conclusions of law are contained in the order denying the petition to suppress evidence (R. 308a-324a) and are not reported. The opinion of the Court of Appeals (Pet. 15-21) is reported at 246 F. 2d 40.

JURISDICTION

The judgment of the Court of Appeals was entered on July 5, 1957. (Pet. 22.) The petition for a writ of certiorari was filed on October 1, 1957. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254.

QUESTION PRESENTED

Whether, after a full hearing, the District Court properly denied a pre-indictment petition to suppress evidence which the petitioner claimed he had turned over to the Government for use in his civil and not his criminal tax case.

RULE INVOLVED

Federal Rules of Criminal Procedure:

RULE 41. SEARCH AND SEIZURE.

* * * *

(e) *Motion for Return of Property and to Suppress Evidence.* A person aggrieved by an unlawful search and seizure may move the district court for the district in which the property was seized for the return of the property and to suppress for the use as evidence anything so obtained on the ground that (1) the property was illegally seized without warrant, or (2) the warrant is insufficient on its face, or (3) the property seized is not that described in the warrant, or (4) there was not probable cause for believing the existence of the grounds on which the warrant was issued, or (5) the warrant was illegally executed. The judge shall receive evidence on any issue of fact necessary to the decision of the motion. If the motion is granted the property shall be restored unless otherwise subject to lawful detention and it shall not be admissible in evidence at any hearing or trial. The motion to suppress evidence may also be made in the district where the trial is to be had. The motion shall be made before trial or hearing unless opportunity therefor did not exist

or the defendant was not aware of the grounds for the motion, but the court in its discretion may entertain the motion at the trial or hearing.

* * * *

STATEMENT

On March 3, 1953, petitioner filed a "Petition to Suppress Evidence" in the United States District Court for the Eastern District of Michigan, alleging that the United States Attorney was about to present evidence to the grand jury in order to have him indicted "for violation of the internal revenue laws in the filing of income tax returns * * * for the years 1946 and 1947" (R. 5a); and that such evidence (consisting of two books) had been obtained from petitioner in violation of his rights under the Fifth Amendment, the books having been delivered to the Treasury agents investigating petitioner's income after petitioner's attorney had been advised by the then Collector of Internal Revenue that "the Government did not consider Petitioner's case an appropriate one for prosecution and that Petitioner would be safe in turning over his books" (R. 6a). The petitioner prayed for (1) an injunction restraining the United States Attorney from using the books or evidence obtained from them in any criminal prosecution of petitioner, and (2) a suppression order to prevent any use of the books, directly or indirectly, as evidence in any criminal prosecution of petitioner. (R. 7a-8a.) On March 10, 1953, the petition was dismissed for want of equity. (R. 12a-15a.) Later, on the same day, an indictment was returned against

petitioner alleging willful attempts to evade large parts of his 1946 income tax and the 1947 income taxes of himself and his wife. (R. 2a-4a.)[1]

On the petitioner's appeal, the cause was remanded to the District Court with instructions to consider the petition upon its merits. (R. 16a.) After a full hearing the District Court again denied the petition. (R. 308a-324a.) The Court of Appeals affirmed (Pet. 15-21.)

The evidence to support the denial of the petition may be briefly summarized as follows:

In December 1948 Internal Revenue Agent Krieger called petitioner on the telephone and advised him that he had been assigned to check petitioner's income tax returns for 1944, 1945 and 1946, and that he would like to see his records. Krieger met petitioner on December 13, 1948, at which time Krieger was furnished with certain records. (R. 227a-228a.) Krieger received no books at this time, and the records petitioner gave him appeared to be inadequate. (R. 229a, 230a.) On or about December 22, 1948, petitioner retained Snider, an attorney, to represent him in the matter. (R. 234a.) Krieger told Snider that he had gone over the records furnished by petitioner; that they seemed to be inadequate; and that he would need a net worth statement since he had

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[1] The order denying the petition was a final and appealable order, and was not rendered moot by the subsequent filing of the indictment. See *Lapides* v. *United States*, 215 F. 2d 253, 254 (C.A. 2d), and cases cited therein.

no other way to determine petitioner's true income. (R. 235a-236a.) Some net worth data was supplied by Snider. (R. 238a-239a.)

In January 1949 Krieger again conferred with Snider, who stated that petitioner was anxious to clear up his tax matter and asked whether some settlement could be arrived at through the use of net worth. (R. 241a.) Krieger replied that his examination had reached the point where he "felt there was a possibility of a fraudulent reporting of income on his returns and that [he] was going to have to call a Special Agent into the case". (R. 241a.) Snider expressed the hope that petitioner would not be in any serious trouble. (R. 242a.) Later that month Special Agent Sullivan was introduced by Krieger to petitioner and to Snider as a special agent of the Intelligence Unit. (R. 244a-245a, 265a, 267a-268a, 288a.) Sullivan asked petitioner whether he had any additional records that he had not turned over to Krieger, and petitioner replied that he had none.[2] (R. 245a-246a, 288a.) Snider admitted that there was a discrepancy between reported income and the increases in net worth, and thought perhaps the tax could be determined by the net worth method. (R. 266a.) Sullivan advised Snider in petitioner's presence that the agents were in no position to accept any estimates of income and that they "were going to have to make [their] own determination in the best way possible". (R. 246a.) Petitioner, who is

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[2] On cross-examination, petitioner testified that he knew that his books were at the hospital. (R. 193a.)

an osteopathic physician who operated a clinic and was associated with a hospital (R. 308a), told Sullivan that all of his surgical patients had been covered by hospitalization insurance. (R. 268a.) Sullivan replied that his experience in examining physicians' returns had been that only a minority of surgical patients are covered by such insurance, and that, in the absence of records, it would be necessary for the agents to secure the names and addresses from the hospital and write to the patients. Petitioner insisted that he could be of no help in securing additional records, and that the agents, if they felt it necessary, should go ahead and circularize the patients. (R. 269a.)

Early in February, 1949, the agents began to prepare extensive lists of petitioner's patients as shown by the hospital records. (R. 249a-251a.) They soon discovered that petitioner had a number of patients not covered by hospitalization insurance. (R. 269a.) In mid-February Sullivan told his supervisor, A. C. Grunewald, that petitioner had produced no books with respect to his surgical income and Sullivan felt it was necessary to write to each of the 6,000 patients. (R. 270a-271a.) Grunewald authorized the use of three or four stenographers for that purpose. (R. 271a.) On February 23, 1949, when the letters were about to be sent out, Snider called Sullivan and advised him that petitioner had some additional records. (R. 271a-272a.) Sullivan went to Snider's office and was advised there by petitioner that he "had some records that were kept at the hospital" by his secretary (R. 272a) and that he would bring them to

Snider's office the next day. On February 24, 1949, petitioner, as he had agreed, produced the two books in Snider's office. (R. 273a.) Petitioner offered them to Sullivan, but, at Sullivan's request, gave them first to Snider so that he might look them over. (R. 273a.) There was no conversation at that time relating to whether petitioner's tax case was a civil or criminal matter, nor was there ever any such conversation involving Sullivan at any time. (R. 274a.)[3]

About one year later petitioner's new attorney, Cashen, was advised by an agent working on the investigation of petitioner's case that "the case was going forward and that if [Cashen] wanted to do anything [he] had to do it within a very short time". (R. 36a.) Cashen thereupon prepared an affidavit for petitioner's signature, and petitioner signed it on February 3, 1950. (R. 33a-34a, 286a.) Petitioner alleged in this affidavit that, prior to the time he turned the books over to the agents, Special Agent Sullivan had given him repeated assurances that his case was purely civil, and that petitioner had "turned over these books and records to Agent Sullivan solely upon his promise and agreement that said investigation was not of a criminal nature, and that he had nothing to fear from any information these books might disclose". (R. 284a, 285a-286a.)[4] These allegations were totally false, and petitioner so admitted

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[3] Internal Revenue Agent Krieger was not present when the books were turned over. (R. 252a.)

[4] This affidavit was filed with Special Agent Sullivan's supervisor, A. C. Grunewald. (R. 39a.)

on the witness stand.[5] (R. 201a-205a.) Sullivan had given no such assurances at any time. (R. 274a-276a.) Snider, who had represented petitioner at the time the books were turned over, admitted that there had been "no agreement whatever by the Agents that there would be no criminal prosecution if he gave them the books". (R. 261a.) Sullivan told Cashen, who had prepared the affidavit, that he could not understand why these charges had been made and asked for an explanation. Cashen replied, "You know, if you can't attack the merits of the case you attack the agents". (R. 276a.)

About one year after the submission of petitioner's original false affidavit, he signed a new one, dated February 27, 1951. (R. 290a.) In that document petitioner alleged that he had retained Snider on the advice of a doctor who claimed to be a friend of the then Collector of Internal Revenue, Kavanagh; that petitioner met Kavanagh, who informed him that his case was only of a civil nature (R. 287a); that petitioner admitted to Snider that he had some additional books but refused to turn them over until he had assurance that "they will not be used against me" (R. 289a); that Snider said he wanted to talk to Kavanagh; that later Snider advised petitioner that Kavanagh, after talking with Grunewald, had

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[5] Cashen attempted to take the responsibility for this affidavit, testifying that he had secured the information from Grunewald and the Treasury agents (R. 31a-35a) because petitioner, his client, refused to tell him the circumstances under which he had turned the books over to the agents (R. 35a, 43a).

told Snider to tell petitioner "to go ahead and turn over the books, that there was not going to be any prosecution" (R. 289a); and that he turned the books over to the agents the next day, at which time "Nothing whatsoever was said about the use of the books, prosecution, voluntary surrender, etc." (R. 289a.)

At the hearing there was introduced into evidence an undated, unsworn statement purportedly signed by Kavanagh in which it was stated that Snider had asked him whether petitioner "would be safe from prosecution if the books were turned over to the agents" and that "Mr. Kavanagh was under the impression that this was a civil, not a criminal, tax case and so advised Mr. Snider". (R. 282a.) Kavanagh died before the petition to suppress evidence was filed. (Pet. 8.) Snider testified that Kavanagh had told him "as far as criminal prosecution is concerned, don't worry about that" (R. 109a), but indicated that Kavanagh's knowledge of the case consisted mainly of petitioner's version of the facts (R. 101a, 102a). Snider had admitted in an affidavit that "it is possible that [he] may have misunderstood Mr. Kavanagh." (R. 10a.) There was other testimony to the effect that Kavanagh had told Snider that "he would not guarantee that there would be no criminal prosecution" (R. 257a) and that Kavanagh had expressed his understanding that "he had no authority to promise any immunity in a criminal case" (R. 27a.)

ARGUMENT

Petitioner's sole contention, that his petition to suppress evidence (filed before the institution of any criminal proceedings against him) should have been granted, is wholly without merit. His argument is based mainly on his own testimony, which the District Court must be deemed to have rejected. That court found, *inter alia*, the facts to be as follows (R. 321a-323a):

> Much of petitioner's testimony given on direct examination failed to withstand the test of cross-examination. There was ample evidence on which to base a conclusion that he was the trapper rather than the trapped. He reposed but little confidence in his attorneys and often kept them in complete ignorance of the true facts. On the basis of only such facts as he chose to disclose, and therefore on a hypothetical state of facts, he invited opinions from government officials, only to claim reliance on the correctness of such opinions as applied to a radically different factual situation.
>
> With the prospect of circularization of his patients, questioning of his employees, and disclosures which these could produce, he had little to lose and hoped he had something to gain by surrendering the books—such as settlement of his tax liability and possible forestalling of criminal prosecution thereby.
>
> Surrender of the two books by petitioner was voluntary, uninduced by any threats, promises, or assurances, made by him directly by any agent or official of the Bureau of Internal Revenue.
> • • •

There were no promises or assurances of any kind given to petitioner through his attorney, by any responsible person in the Bureau of Internal Revenue, to compel surrender of the books. Even if any of the statements to Snider could be so construed, they were unauthorized and Kavanagh's lack of authority was well known to petitioner's counsel.

At the time the books were surrendered no criminal prosecution was, in fact, contemplated, and any inquiries which were made of government officials as to the status of the case were truthful and not misleading. Petitioner had superior knowledge of what the investigation would in the end produce, when the investigation was still in the "embryonic stages", and he had reason to believe that it would uncover substantially the same information which the withheld records contained, but by a more painful method, both to him and to the investigators. He was aided by the assistance of counsel at every step and if he was not fully advised, he alone was responsible for the situation by his failure to submit truthful information to counsel, and must bear the consequences. He cannot attribute it to any acts on the part of government officials.

These findings of fact are amply supported by the record (*supra*, pp. 4-9).[8] It is apparent that no violation of petitioner's privilege against self-incrimination is involved.

Even assuming, *arguendo*, that there would be a

[8] It should be noted that the Government called three witnesses at the hearing, all of them Treasury agents, and that the defense declined to cross-examine any of them. (R. 252a, 262a, 277a.)

violation of petitioner's privilege against self-incrimination, if the two books were admitted in evidence at his trial, the denial of his pre-indictment petition to supress would nevertheless have been proper. The only authorization for a pre-indictment proceeding to suppress evidence is found in Rule 41(e) of the Federal Rules of Criminal Procedure, *supra*, pp. 2-3. Under that rule, pre-indictment petitions to suppress are authorized only in cases where the evidence comes into the possession of the Government as the result of an unlawful search and seizure forbidden by the Fourth Amendment. *Benes* v. *Canary*, 224 F. 2d 470 (C.A. 6th), certiorari denied, 350 U.S. 913; *Centracchio* v. *Garrity*, 198 F. 2d 382 (C.A. 1st), certiorari denied, 344 U.S. 866; see also *Chieftain Pontiac Corp.* v. *Julian*, 209 F. 2d 657, 659 (C.A. 1st). The only case we can find to the contrary is *In re Fried*, 161 F. 2d 453 (C.A. 2d), certiorari granted, 331 U.S. 804, certiorari dismissed, 332 U.S. 807. In that case the Second Circuit, by a divided court, held that Rule 41(e) was applicable to a confession obtained by a combination of threats of physical violence and third degree police methods, a far cry from the factual situation in the case at bar.[7]

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[7] Petitioner asserts no conflict between the *Fried* case and the other cases cited above. He contends, however, that the *Centracchio* and *Benes* cases, *supra*, are in conflict with *United States* v. *Shotwell Manufacturing Co.*, 225 F. 2d 394 (C.A. 7th), certiorari granted (limited to issues raised in a motion to remand) 352 U.S. 997. As to this, we need only point out that the *Shotwell* case did not involve a pre-indictment proceeding.

Finally, it should be pointed out that petitioner errs in the contention (Pet. 10) that the affirmance by the Court of Appeals "presumably renders such issue *res adjudicata* and precludes a later proper consideration of the evidence relative thereto". The order of the District Court states: "The petition to suppress evidence is denied but without prejudice as to any issues on the competency or incompetency of evidence therein raised". (R. 324a.) And the Court of Appeals held (Pet. 19):

> There is no attempt in the present case to deprive the appellant of any rights which he might have to prevent the use of evidence complained of in the prosecution of the pending indictment against him. It is a question of procedure rather than one of substantive law. When and in what manner the objection to its use is to be made is the question involved.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted,

J. LEE RANKIN,
Solicitor General.

CHARLES K. RICE,
Assistant Attorney General.

JOSEPH F. GOETTEN,
RICHARD B. BUHRMAN,
Attorneys.

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